UNITED STATES DEPARTMENT OF LABOR • OFFICE OF ADMINISTRATIVE LAW JUDGES

# Whistleblower Newsletter

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# AIR21

***Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century***

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**ADVERSE ACTION; FILING A MOTION FOR SANCTIONS AGAINST COMPLAINANT IS NOT, IN ITSELF, ADVERSE EMPLOYMENT ACTION**

In ***Powers v. Pinnacle Airlines, Inc.***, 2004-AIR-6 (ALJ Dec. 16, 2003), Complainant alleged, *inter alia*, that Respondent retaliated against her by "illegally" asking for monetary sanctions against her in another case pending at the time (2003-AIR-12). The ALJ ruled that requesting sanctions for Complainant's refusal to cooperate in discovery did not in itself constitute an adverse employment action, and that where Complainant had not alleged any tangible job consequences, Complainant had not stated a claim of action against Respondent with respect to this allegation.

**REQUEST FOR ARB REVIEW; TIMELINESS; EQUITABLE TOLLING**

Where Complainant failed to file a request for ARB review within the 15 day period provided for in 29 C.F.R. § 1979.110(a), the ARB dismissed the appeal in ***Stoneking v. Avbase Aviation***, ARB No. 03-101, ALJ No. 2002-AIR-7 (ARB July 29, 2003). Complainant had filed a letter with the OALJ about one month after the due date for the appeal stating that he was requesting review of the ALJ's decision and order, and that he had not received the ALJ's decision until a week earlier as it was not sent to the correct address for timely delivery. The OALJ forwarded the letter to the ARB. Respondent opposed the petition for review, and the ARB issued an order to show cause to which Complainant did not reply. The ARB stated that 29 C.F.R. §

1979.100(b) is an internal procedural rule that is within the ARB's discretion to equitably relieve a party. The ARB stated that it was guided by the principles of equitable tolling applied in statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. The ARB dismissed the appeal because Complainant had failed to explain the untimely filing. The ARB found that the note to the ALJ that the decision had not been sent to the correct address was insufficient to support tolling of the limitations period, especially because Complainant was represented by counsel.

**TIMELINESS OF HEARING REQUEST; 30 CALENDAR DAYS NOT EXTENDED BY 29 C.F.R. § 18.4(c)(3); LACK OF TIMELINESS NOT JURISDICTIONAL BAR BUT SUBJECT TO EQUITABLE TOLLING; LACK OF PREJUDICE STANDING ALONE DOES NOT SUPPORT EQUITABLE TOLLING**

In ***Swint v. Net Jets Aviation, Inc.***, 2003-AIR-26 (ALJ July 9, 2003), *appealed dismissed on basis of settlement*, ARB No. 03-124, ALJ No. 2003-AIR-26 (ARB Nov. 25, 2003), the ALJ found that the OALJ Rules of Practice at 29 C.F.R. § 18.4(c)(3) did not operate to allow five additional days for the mailing of an objection to OSHA's findings on an AIR21 whistleblower complaint. In ***Swint***, Complainant's objection was postmarked on the 32d day following receipt of OSHA's findings (which was one day outside the 30 day period provided for under the statute and regulation, as the 30th day fell on a Sunday). Complainant contended that section 18.4(c)(3) operated to allow five additional days for mailing. The ALJ, however, found that the plain language of both the statute and the regulation require objections and requests for hearings must be filed "within 30 days" or "not later than 30 days." Moreover, 29 C.F.R. § 1979.106(a) explicitly states that the date of postmark is considered the date of filing. The ALJ therefore found that the hearing request was untimely. The ALJ, however, rejected Respondent's contention that an untimely filing deprives OALJ of subject matter jurisdiction. Rather, the ALJ proceeded to consider whether grounds existed for equitable tolling and found that the circumstances of the case did not justify equitable relief. The ALJ rejected Complainant's argument that there would be no prejudice to Respondent to apply equitable tolling, noting caselaw to the effect that lack of prejudice cannot be the determining factor in permitting a late filing.

# ERA

***Energy Reorganization Act***

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[Nuclear & Environmental Whistleblower Digest VI B]

**REQUEST FOR HEARING; FAILURE TO SERVE RESPONDENTS**

In ***Steffenhagen v. Securitas Sverige, AB, et al.***, 2004-ERA-3 (ALJ Dec. 16, 2003), the ALJ recommended dismissal of the complaint where Complainant failed to serve the Respondents with a copy of the request for hearing as provided by 29 C.F.R. § 24.4(d)(3). Part of the reason OSHA issued findings adverse to Complainant had been his failure to provide contact information regarding the Respondents named in the complaint. The request for hearing showed service on a number of individuals, but the only named Respondent served was the U.S. Department of Energy. Sixteen other Respondents, including alleged foreign corporations, individuals, and labor unions were not shown as having been served. In an untimely response, Complainant through counsel argued that it was OSHA's responsibility to effect service of the complaint upon Respondents and moved for remand. The ALJ found that Complainant had ample

opportunity to provide OSHA with the information needed to conduct its investigation and denied remand. Moreover, OSHA's responsibility to serve the complaint did not relieve Complainant of his responsibility to serve the request for a hearing.

[Nuclear & Environmental Whistleblower Digest VI C]
**FAILURE TO SERVE RESPONDENT WITH COPY OF REQUEST FOR ALJ HEARING**

In ***Hibler v. Exelon Nuclear Generating Co., LLC***, 2003-ERA-9 (ALJ May 5, 2003), the Respondent filed a Motion to Dismiss citing lack of jurisdiction, and specifically Complainant's failure to serve Respondent with a copy of his hearing request as provided by the regulations at 29 C.F.R. § 24.4(d)(3). The ALJ denied the motion, observing that the regulation did not state any consequences for failure to serve a Respondent. The ALJ also observed that OSHA's determination letter likewise did not note any consequences for failure to serve a respondent. The ALJ noted that this ruling was in conflict with the ALJs' holdings in *Webb v. Numanco, LLC*, 1998-ERA-27 (ALJ July 17, 1998) and *Cruver v. Burns International*, 2001-ERA-31 (ALJ Dec. 5, 2001), but concluded that dismissal was too harsh a result for the *pro se* Complainant. In ***Hibler v. Exelon Nuclear Generating Co., LLC***, 2003-ERA-9 (ALJ June 4, 2003), the ALJ found that the Respondent had presented a persuasive basis to assert interlocutory jurisdiction because it had demonstrated, as required by 28 U.S.C. § 1292(b), that certification of the jurisdictional issue involves a controlling question of law as to which there is a substantial ground for difference of opinion and immediate appeal of the issue will materially advance the ultimate termination of the litigation.

[Nuclear & Environmental Whistleblower Digest VII C 3]
**USE OF FRCP 12(b)(6) STANDARD IN DETERMINING WHETHER COMPLAINANT HAD MADE A SHOWING OF A PRIMA FACIE CASE**

In ***Hasan v. Stone & Webster Engineers & Constructors, Inc.***, ARB No. 03-058, ALJ No. 2000-ERA-10 (ARB June 27, 2003), the ARB adopted the ALJ's recommendation to dismiss for failure to state a claim upon which relief may be granted under FRCP 12(b)(6), finding that the ALJ's decision fairly related the facts and the proper legal framework. In the ALJ's decision, the standards set out in the FRCP 12(b)(6) were used in considering whether dismissal was appropriate. The ALJ noted that "failure to allege a prima facie case is grounds for immediate dismissal. *See Lovermi v. Bell South Mobility, Inc.*, 962 F. Supp. 136, 139 (S.D. Fla. 1997); *Briggs v. Sterner*, 529 F. Supp. 1155, 1164 (S.D. Iowa 1981)." ***Hasan v. Stone & Webster Engineers & Constructors, Inc.***, 2000-ERA-10 (ALJ Feb. 6, 2003). Complainant's allegation was that Respondent failed to rehire him because of protected activity. The ALJ applied the prima facie case analysis for a refusal to hire case, and found:

- Complainant's allegation of reporting safety concerns to the NRC satisfied the protected activity element of a prima facie case
- Complainant's stating in his application letter that he was a whistleblower was sufficient to raise an inference that Respondent knew about his protected activity.
- Complainant applied for the job in response to an Internet advertisement and was not hired, thus meeting those elements of a refusal to hire case, but failed to allege that the position remained open and Respondent continued to seek applications from persons of

> Complainant's qualifications. Thus, Complainant failed to establish this element of a prima facie case.
> - Complainant failed make a prima facie showing to raise a reasonable inference that the protected activity was the likely reason for the adverse action.

[Nuclear & Environmental Whistleblower Digest VII C 3]
**DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED; GATEKEEPING FUNCTION OF PRIMA FACIE CASE IN ERA CASES**

In ***Hasan v. Stone & Webster Engineers & Constructors, Inc.***, ARB No. 03-058, ALJ No. 2000-ERA-10 (ARB June 27, 2003), Complainant contended that the ALJ erred in granting Respondent's FRCP 12(b)(6) Motion to Dismiss because his ERA complaint does not have to allege specific facts establishing a prima facie case of discrimination under *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). The ARB wrote:

> Like the ALJ, we reject this argument. The *Swierkiewicz* holding is confined to the application of FRCP 8(a)(2) to Title VII (42 U.S.C.A. § 2000e *et seq*.) and Age Discrimination In Employment Act (29 U.S.C.A. § 621 *et seq*.) cases. Furthermore, we agree with Stone and Webster that Congress expressly made the prima facie standard a pleading requirement for ERA complainants. *See* Brief of Respondent at 9; 42 U.S.C.A. § 5851(b)(3)(A) ("The Secretary shall dismiss a complaint . . . unless the complainant has made a prima facie showing . . . ."). *See also Trimmer v. U.S. Department of Labor*, 174 F. 3d 1098, 1101(10th Cir. 1999) (explaining that Congress was concerned about stemming frivolous complaints and consequently amended § 5851 to include a gatekeeping function whereby the Secretary cannot investigate an ERA complaint unless the complainant has made a prima facie showing).

Slip op. at n.4.

[Nuclear & Environmental Whistleblower Digest VIII B 2 e]
**ARB REVIEW; ALLEGATIONS OF PROCEDURAL ERROR REVIEWED UNDER ABUSE OF DISCRETION STANDARD**

The ARB reviews an ALJ's findings of fact and conclusions of law in an ERA whisteblower case de novo. Allegations of procedural error by the ALJ, however, are reviewed under an abuse of discretion standard. ***Hasan v. J.A. Jones, Inc.***, ARB No. 02-121, ALJ No. 2002-ERA-18 (ARB June 25, 2003).

[Nuclear & Environmental Whistleblower Digest VIII B 3]
**INTERLOCUTORY APPEAL; ALJ'S CERTIFICATION OF ISSUE**

See ***Hibler v. Exelon Nuclear Generating Co., LLC***, 2003-ERA-9 (ALJ June 4, 2003), case noted at VI C regarding the ALJ's certification of jurisdictional issue.

[Nuclear & Environmental Whistleblower Digest IX B 2]
**ARB PLEADING REQUIREMENTS; DISMISSAL OF APPEAL WHERE COMPLAINANT FAILED TO TIMELY FILE APPELLATE BRIEF OR STATE BASIS FOR APPEAL IN PETITION FOR REVIEW**

In ***Vincent v. Laborer's International Union Local 348***, ARB No. 02-066, ALJ No. 2000-ERA-24 (ARB July 30, 2003), the ALJ had recommended dismissal and Complainant took an appeal to the ARB. The ARB issued a Notice of Appeal and Order Establishing Briefing Schedule. Subsequently, Complainant's attorney withdrew. The ARB granted a 60 day extension of time for filing briefs. Complainant failed to file a timely brief and the ARB issued an order to show cause, to which Complainant did not respond. The ARB determined that even though Complainant's counsel withdrew during the pendency of the appeal, the record provided no indication that Complainant's failure to file a brief or to respond to the order to show cause were due to a lack of legal training. Because of these failures to respond and the fact that 11 months had passed since the deadline for filing a brief, the ARB concluded that Complainant had abandoned his appeal, and therefore dismissed the complaint.

[Nuclear & Environmental Whistleblower Digest IX B 2]
**APPELLATE BRIEF; FAILURE TO ESTABLISH EXTRAORDINARY CIRCUMSTANCES SUFFICIENT TO JUSTIFY FOURTH EXTENSION OF TIME**

In ***Reid v. Niagara Mohawk Power Corp.***, ARB No. 03-039, ALJ No. 2002-ERA-3 (ARB Dec. 16, 2003), the ARB dismissed Complainant's appeal for failure to prosecute where he had been granted three extensions of time to file his appellate brief, had been warned that no further extensions would be granted absent a showing of extraordinary circumstances, and Complainant's fourth request for an extension ignored the directive to state extraordinary circumstances. In response to an order to show cause, Complainant averred that he was under the mistaken impression that an attorney had agreed to handle the case. The Board, however, did not find this averment sufficient to avoid dismissal because Complainant knew that he was unlikely to receive any further enlargement of time, but apparently made no effort to communicate with the attorney to discuss the case or to confirm that a brief would be filed. The Board wrote: "While the Board does not hold pro se parties to the same standards of professional expertise as those represented by counsel, even pro se parties have an obligation to take the orders of the Board seriously and to comply with them." Slip op. at 3 (citation omitted). The Board noted that Complainant's appeal in a prior case had likewise been dismissed for failure to prosecute.

[Nuclear & Environmental Whistleblower Digest XI A 1]
**EVIDENTIARY FRAMEWORK FOR ERA WHISTEBLOWER CASES**

In ***Kester v. Carolina Power & Light Co.***, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003), the ARB determined to clarify the overall evidentiary framework for ERA whistleblower cases because of continuing confusion. The Board wrote:

> Prior to the 1992 amendments, the Act itself did not provide guidance as to the parties' burdens of proof. An ERA complainant, to prevail, was required to prove by a preponderance of the evidence that his protected activity was a "motivating factor" in the employer's unfavorable personnel decision. If the complainant proved

> his case, the employer could avoid liability if it could show, also by a preponderance of the evidence, that it would have reached the same decision even absent the protected conduct.
>
> In 1992 Congress amended section 5851 of the Act. Now, unless an ERA complainant, before the hearing, makes a "prima facie showing" that his protected activity was a "contributing factor in the unfavorable personnel action alleged in the complaint," the Secretary of Labor will not investigate and must dismiss his complaint. Should the complainant make this initial "prima facie showing," the Secretary investigates the claim unless the employer "demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior." When the complainant reaches the hearing stage of the ERA litigation process, however, he must "demonstrate," that is, prove by a preponderance of the evidence, that his protected activity was a "contributing factor" in the employer's decision. Even then, the Secretary may not grant relief if the employer demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence" of protected activity.
>
> Therefore, since this case has been tried on the merits, the relevant inquiry before us is whether Kester has successfully met his burden of proof that CP&L discriminated. That burden is to prove by a preponderance of evidence that he engaged in protected activity under the ERA, that CP&L knew about this activity and took adverse action against him, and that his protected activity was a contributing factor in the adverse action CP&L took. Then, if Kester meets this burden, we will proceed to determine whether CP&L has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. CP&L's burden of proof is in the nature of an affirmative defense and arises only if Kester has proven that CP&L fired him in part because of his protected activity. Examining whether CP&L meets this burden of proof is typically referred to as "dual motive" analysis. If Kester does not prove that CP&L fired him in part because of his protected activity, neither the ALJ nor we have reason to engage in dual motive analysis.

Slip op. at 5-8 (footnotes omitted). In extensive footnotes, the Board endeavored to correct some misinterpretations of the evidentiary framework it had detected in various ALJ opinions. The Board clarified that the 1992 amendments to the whistleblower provision of the ERA created a framework “distinct” from that of Title VII insofar as the amendments created a gatekeeper function that prevents investigation by the Secretary if, prior to the hearing, the complaint fails to make a prima facie

showing that his or her protected activity was a contributing factor in the unfavorable personnel action alleged. This distinction does not mean that Title VII methodology may not be applied, when appropriate, in DOL ERA whistleblower adjudications. Rather, because most ERA complaints are grounded in circumstantial evidence of retaliatory intent, Title VII analytical frameworks are routinely applied by the ARB and reviewing courts – although an ALJ is discouraged from the unnecessary discussion of whether a prima facie case has been established once the case has been fully tried.

The Board also clarified that the Title VII burden-shifting framework is applied in circumstantial evidence cases, but is not needed in direct evidence cases. The Board cautioned against confusing a litigant's "burden of proof" with the "evidentiary framework" employed to evaluate proof of discrimination. Observing that "burden of proof" has been used indiscriminately in court opinions, correctly used "the term means the necessity of *finally* establishing the existence of a fact or set of facts by evidence which meets a particular 'standard of proof,' e.g., preponderance, clear or convincing, beyond a reasonable doubt." Slip op. at n.17 (citation omitted; emphasis as in original).

Finally, the Board clarified that a ERA complainant is not required to produce "direct" evidence in order to trigger the dual motive analysis. Rather, "[t]he Act requires only that the complainant prove by a preponderance of sufficient evidence, direct or circumstantial, that the protected activity contributed to the employer's decision." Slip op. at n.17 (citation omitted).

[Nuclear & Environmental Whistleblower Digest XI A 2 a]
**MOTIVATION TO DISCRIMINATE; MERE SPECULATION DOES NOT CARRY COMPLAINANT'S BURDEN OF PROOF**

In ***Hasan v. J.A. Jones, Inc.***, ARB No. 02-123, ALJ No. 2002-ERA-5 (ARB June 25, 2003), the ARB affirmed the ALJ's decision finding that Respondent's decision makers were not aware of Complainant's previous whistleblowing activities when they decided not to promote him, and that Complainant had produced no evidence that his whistleblowing had motivated Respondents to take other adverse actions such as failing to increase his salary, laying him off, and refusing to transfer or rehire him.

[Nuclear & Environmental Whistleblower Digest XI A 2 a]
**RETALIATORY MOTIVE; COMPLIANCE WITH ARB ORDER TO CORRECT EMPLOYMENT REFERENCES; MERE REFERENCE TO EARLIER IMPROPER REFERENCE WITHOUT PROOF OF RETALIATORY MOTIVE IS NOT ERA VIOLATION**

In ***Doyle v. Westinghouse Electric Co., LLC***, ARB Nos. 01-073 and 01-074, ALJ No. 2001-ERA-13 (ARB June 30, 2003), the ARB affirmed decisions of the ALJ finding that Complainant had failed to prove that Respondents had acted with retaliatory motive when complying with an ARB order to (1) write to a credit reporting agency to notify the agency that the ARB had found that its earlier denial of Complainant unescorted access to a nuclear plant had been improper and (2) provide a neutral employment reference letter. Complainant argued that Respondent's letter to the credit reporting agency and the copy sent to Complainant's attorney violated the ERA because they identified him as having engaged in protected activity. (one of the credit reporting agency's products was employment reports for prospective employers).

The ALJ found that under the circumstances it would have been unavoidable for Respondent not to reference the prior disqualification in its letter to the credit reporting agency in compliance with the ARB's order. *Doyle v. Westinghouse Electric Co.*, 2001-ERA-13 (ALJ June 27, 2001) (order granting summary decision to Westinghouse). The ALJ wrote: "Without further indications of specific adverse action, the existence of this letter, which contains no language or instructions detrimental to Complainant, is not sufficient to establish the requisite elements of a prima facie case." Slip op. at 4 (citation omitted).

Complainant had also named Respondent's attorney and her law firm as respondents. The ALJ in a separate ruling dismissed these respondents for the additional reason that they were not Complainant's employer. *Doyle v. Westinghouse Electric Co.*, 2001-ERA-13 (ALJ June 27, 2001) (order granting summary decision to Respondent's attorney and law firm).

[Nuclear & Environmental Whistleblower Digest XI A 2 c]
**IMPUTED KNOWLEDGE OF PROTECTED ACTIVITY; PERSON WITH KNOWLEDGE OF PROTECTED ACTIVITY HAD SUBSTANTIAL INPUT INTO DECISION TO FIRE COMPLAINANT**

Where Complainant's supervisor had knowledge of Complainant's protected activity and had substantial input into the decision to fire Complainant, even though the vice-president who actually fired Complainant did not know about the protected activity, such knowledge could be imputed to Respondent. ***Kester v. Carolina Power & Light Co.***, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003).

[Nuclear & Environmental Whistleblower Digest XI B 3]
**UTILITY OF PRIMA FACIE CASE ANALYSIS AFTER CASE HAS BEEN FULLY TRIED ON THE MERITS**

The ARB discourages the unnecessary discussion of whether a whistleblower has established a *prima facie* case when the case has been fully tried. ***Kester v. Carolina Power & Light Co.***, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003).

[Nuclear & Environmental Whistleblower Digest XII A]
**PROTECTED ACTIVITY; MUST IMPLICATE SAFETY DEFINITIVELY AND SPECIFICALLY; REPORT OF BLACKMAIL ATTEMPT TO CLEAR WAY FOR HONEST REPORT TO NRC CONCERNING DEFICIENCIES IN CLEARANCES FOR AUTHORIZED ACCESS IMPLICATES SAFETY**

To constitute protected activity under the ERA, an employee's acts must implicate safety definitively and specifically. *American Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). In ***Kester v. Carolina Power & Light Co.***, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003), Complainant had reported to company officials an attempt by his supervisor to blackmail him to take the blame for falsification of authorized access clearances in order to clear the way for Complainant to report honestly to an NRC investigator about the events without fear of reprisal by his supervisor. The ARB held that this implicated safety and was protected activity because Complainant's department was the first line of defense in protecting Respondent's nuclear plants from persons lacking authorized access.

[Nuclear & Environmental Whistleblower Digest XIII B 8]
**FAILURE TO HIRE; COMPLAINANT MUST ESTABLISH THAT HE WAS QUALIFIED FOR THE POSITION**

In ***Hasan v. J.A. Jones, Inc.***, ARB No. 02-121, ALJ No. 2002-ERA-18 (ARB June 25, 2003), Complainant applied for the position of "Piping Group Leader." In an e-mail cover letter accompanying his resume, Complainant requested that the recipients not discriminate and retaliate against him "for being a Truthful and Honest Whistleblower of this Country and for filing a [previous] Whistleblower complaint against J. A. Jones, Inc., and its subsidiaries." When Complainant was not hired, he filed an ERA discrimination complaint. The ARB adopted the ALJ's findings that the hiring officials did not consider Complainant qualified for the piping group leader position and that his previous whistleblowing had no effect on that determination.

[Nuclear & Environmental Whistleblower Digest XIV B 2]
**INDIVIDUAL LIABILITY OF SUPERVISORY EMPLOYEES; EMPLOYEES ARE NOT EMPLOYERS WITHIN MEANING OF ERA WHISTLEBLOWER PROVISION**

In ***Bath v. U.S. Nuclear Regulatory Commission***, ARB No. 02-041, ALJ No. 2001-ERA-41 (ARB Sept. 29, 2003), the ARB applied its recent decision in *Pastor v. Dept. of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003) holding that a claim for money damages against a Federal agency based on 42 U.S.C. § 5851 (the whistleblower provision of the ERA) is barred by sovereign immunity. In ***Bath***, Complainant had argued that section 5851's legislative history showed that individual Congressmen assumed that NRC contract employees would be protected. The ARB observed, however, that *Pastor* had held that legislative history is not a valid basis for inferring legislative intent to waive sovereign immunity, departing from earlier authority such as *Teles v. DOE*, 1994-ERA-22 (Sec'y Aug. 7, 1995). The Complainant in ***Bath*** argued that *Pastor* still permitted suit against individual NRC employees. The ARB agreed that NRC's sovereign immunity does not bar claims against NRC employees in their individual capacities; however, the ARB found that the complaint against individual employees must be dismissed. The ARB wrote:

> The sine qua non of a § 5851 complaint is the employer-employee relationship. "No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" complained about covered safety hazards. 42 U.S.C.A. § 5851(a)(1). "Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has" engaged in protected activity. 29 C.F.R. § 24.2(b) (2002). "Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) [which prohibits discrimination by an employer] may . . . file . . . a complaint. . . ." 42 U.S.C.A. § 5851(b)(1). *See Billings v. OFCCP*, No. 91-ERA-35, slip op. at 2 (Sec'y Sept. 24, 1991) ("It is well established that a necessary element of

> a valid ERA claim under Section 5851 is that the party charged with discrimination be an employer subject to the Act"); *Varnadore*, slip op. at 58 ("[P]ersons who are not 'employers' within the meaning given that word in the ERA may not be held liable for whistleblower violations").
>
> Even if, as Bath alleges, NRC employees directed him in his work and influenced Robotech's decision to fire him, that would not make them employers in their own right. Employees are not employers within the meaning of § 5851 even if they are supervisory employees. *Kesterson v. Y-12 Nuclear Weapons Plant*, ALJ No. 95-CAA-0012, slip op. at 10 (Aug. 15, 1996), *affirmed*, ARB No. 96-173 (ARB Apr. 8, 1997) (dismissing § 5851 complaint against employees of employer because the complainant "failed to set forth any allegations that, even if taken as true and construed in the light most favorable to him, establish an employment relationship with these individuals rather than a mere supervisory relationship"). Bath's reliance on Robotech's contract with the NRC is misplaced. The contract cannot expand the scope of the statute.

[Nuclear & Environmental Whistleblower Digest XIV B 4 j]
**EMPLOYER; NO LIABILITY OF RESPONDENTS' ATTORNEY AND LAW FIRM WERE THEY WERE NOT COMPLAINANT'S EMPLOYERS**

See ***Doyle v. Westinghouse Electric Co., LLC***, ARB Nos. 01-073 and 01-074, ALJ No. 2001-ERA-13 (ARB June 30, 2003), casenoted at XIV B 4.

[Nuclear & Environmental Whistleblower Digest XVIII C 8]
**DISMISSAL FOR LACK OF PROSECUTION; FAILURE TO FILE TIMELY APPELLATE BRIEF**

In ***Vincent v. Laborers' International Union Local 348***, ARB No. 02-066, ALJ No. 2000-ERA-24 (ARB July 30, 2003), the ALJ had recommended dismissal based on a finding that Respondent was not a covered respondent under the CERCLA or SWDA (Complainant had earlier withdrawn complaints brought under the ERA and other environmental statutes). Complainant filed a petition for review by the ARB and a briefing schedule was issued. Subsequently, Complainant's attorney withdrew and the ARB extended the time for filing an appellate brief. Complainant never filed a brief. The ARB, noting that it had held that 29 C.F.R. § 24.8(a) and (b) had been construed to require the filing of an appellate brief dismissed the complaint for lack of prosecution.

[Nuclear & Environmental Whistleblower Digest XX E]
**SOVEREIGN IMMUNITY; LEGISLATIVE HISTORY CANNOT SUPPORT INFERENCE OF WAIVER**

*See* ***Bath v. U.S. Nuclear Regulatory Commission***, ARB No. 02-041, ALJ No. 2001-ERA-41 (ARB Sept. 29, 2003), casenoted at XIV B 2.

[Nuclear & Environmental Whistleblower Digest II B 1 b]
**ADDITION OF PARTIES; DUE PROCESS CONSIDERATIONS UNDER 29 C.F.R. § 18.5(e)**

When considering a motion to amend a complaint to add parties, the regulation at 29 C.F.R. § 18.5(e) applies. Moreover, although the Secretary's interpretation of section 18.5(e) in *Wilson v. Bolin Associates, Inc.*, 1991-STA-4 (Sec'y Dec. 20, 1991), supports the proposition that a complaint may be amended to add an individual party respondent, that decision also requires consideration of whether such is consistent with due process. ***Ewald v. Commonwealth of Virginia, Dept. of Waste Management***, ARB No. 02-027, ALJ No. 1989-SDW-1 (ARB Dec. 19, 2003). In *Bolin*, the individual sought to be added had received notice from the outset of the case and had participated in the investigation and all proceedings before DOL. In ***Ewald***, however, the ARB affirmed the ALJ's denial of an amendment to the complaint to add certain parties where they had not participated in the proceedings in about a decade. The ARB also affirmed the ALJ's finding that the current head of the Waste Management Department, who Complainant sought to add in his individual capacity, had no authority to effect a remedy to Complainant and was not susceptible to individual liability merely because he had assumed a public office.

[Nuclear & Environmental Whistleblower Digest IV C 9]
**TIMELINESS OF COMPLAINT; EQUITABLE TOLLING; COMPLAINANT'S MENTAL CONDITION; COMPLAINANT REPRESENTED BY COUNSEL**

In ***Day v. Oak Ridge Operations***, ARB No. 02-032, ALJ No. 1999-CAA-23 (ARB July 25, 2003), the ARB affirmed and adopted the ALJ's recommendation that the complaint be dismissed as untimely. Complainant had proffered a number of reasons for equitable tolling, none of which were found to be valid by the ALJ. One of the grounds proffered was that Complainant's mental condition at the time prevented him from managing his affairs. The ALJ, however, noted caselaw to the effect that tolling for mental incapacity is permitted only for exceptional circumstances such as adjudication of incompetency or institutionalization – neither of which were relevant to the instant case. Moreover, the ALJ observed that Complainant had consulted with an attorney and had discussed a whistleblower law suit. The ALJ noted that the Secretary had previously held that equitable tolling is generally inapplicable where a plaintiff if represented by counsel. The ALJ noted that the question of the (former) attorney's mental state was also raised during the hearing, and that while applicable caselaw may have permitted equitable tolling in such a circumstance, there was insufficient evidence of record to show that Complainant's former attorney was so impaired. ***Day v. Oak Ridge Operations***, 1999-CAA-23 (ALJ Dec. 31, 2001).

On review, the ARB observed in a footnote:

> For additional authority that equitable tolling is generally inapplicable when a plaintiff is represented by counsel, *see, e.g., Hall v. E G & G Defense Materials, Inc.*, ARB No. 98-076, ALJ No. 97-SDW-9, slip op. at n.5 (ARB Sept. 30, 1998); *Lawrence v. City of Andalusia Waste*

> *Water Treatment Facility*, ARB No. 96-059, ALJ No. 95-WPC-6 (ARB Sept. 23, 1996); *Tracy v. Consol. Edison Co. of New York, Inc.*, 89-CAA-1 (Sec'y July 8, 1992). The federal circuit courts support the general principle that "once a claimant retains counsel, tolling ceases because she has 'gained the 'means of knowledge' of her rights and can be charged with constructive knowledge of the law's requirements.' " *Leorna v. United States Dep't of State*, 105 F.3d 548, 551 (9th Cir. 1997), citing *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1050 (9th Cir. 1987); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 896 (1st Cir. 1992); *Daugherity v. Traylor Bros., Inc.*, 970 F.2d 348, 353 n.8 (7th Cir. 1992); *Beshears v. Asbill*, 930 F.2d 1348, 1351 (8th Cir. 1991); *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483, 1486 n.4 (11th Cir. 1984); *Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012-13 (4th Cir. 1983); *Kocian v. Getty Refining & Mktg. Co.*, 707 F.2d 748, 755 (3d Cir. 1983); *Keyse v. California Texas Oil Corp.*, 590 F.2d 45, 47 (2d Cir. 1978); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 n.8 (5th Cir. 1975).

Slip op. at n.2.

[Nuclear & Environmental Whistleblower Digest VII A 4]
**PRIVILEGE LOG; DISCRETION OF ALJ TO ORDER**

In ***Kaufman v. U.S. Environmental Protection Agency***, 2002-CAA-22 (ALJ Oct. 31, 2003), the ALJ ruled that although the OALJ Rules of Practice and Procedure do not mention the production of a privilege log (*see* 29 C.F.R. Part 18, *e.g.*, § 18.14(c) and 18.46), an ALJ has the authority to order such a discovery device. In the instant case, however, the ALJ found no justification for ordering such a log as Complainant had affirmatively stated that he did not seek privileged documents.

[Nuclear & Environmental Whistleblower Digest VII A 5]
**DISCOVERY; DEPOSITION OF HIGH RANKING GOVERNMENT OFFICALS**

In ***Kaufman v. U.S. Environmental Protection Agency***, 2002-CAA-22 (ALJ Oct. 17, 2002), the ALJ granted Respondent's motion for a protective order on the ground that the named deponents were high-ranking government officials. The ALJ found that when named deponents are high ranking government officials a heightened showing is required "that the individually named deponents *actually have* personal information regarding discoverable matters and a deposition is the *only way* such information can be obtained." Slip op at 2 (citations omitted) (emphasis as in original). The ALJ found that Complainant had not shown that the officials actually had personal knowledge of the subject matter of the complaint, and that "[i]f Complainant wishes to question these individuals, the submission of interrogatories ... is the appropriate manner in which to initially proceed to determine whether these individuals have any knowledge relevant to the alleged whistleblower retaliation set form the Complaints." *Id*.

*See also* ***Kaufman v. U.S. Environmental Protection Agency***, 2002-CAA-22 (ALJ Jan. 31, 2003) (granting protective order for two high ranking officials based on Complainant's failure to establish that the named deponents had personal relevant

information); ***Kaufman v. U.S. Environmental Protection Agency***, 2002-CAA-22 (ALJ Apr. 2, 2003) (vacating the protective order in regard to one of the named deponents where Complainant presented proof that she possessed personal knowledge relevant to the allegations stated in the complaint; ruling that where the official no longer holds a high ranking position, the heightened scrutiny of deposition requests was not present because that protection is based on high ranking officials' greater duties and time constraints); ***Kaufman v. U.S. Environmental Protection Agency***, 2002-CAA-22 (ALJ Aug. 5, 2003) (denying motion to compel discovery regarding the aforementioned official on the ground that the individual was no longer in Respondent's employ and therefore it longer has any control over that individual); ***Kaufman v. U.S. Environmental Protection Agency***, 2002-CAA-22 (ALJ Aug. 8, 2003) (affirming earlier protective order as to other high ranking official).

[Nuclear & Environmental Whistleblower Digest VII A 6]
**DISCOVERY; INFORMATON ABOUT AGENCY'S RECORDS MANAGEMENT AND ELECTRONIC RECORD KEEPING**

In ***Kaufman v. U.S. Environmental Protection Agency***, 2002-CAA-22 (ALJ Aug. 5, 2003), Complainant sought to depose witnesses concerning EPA's "response to document production requests as they relate to electronic records made by Complainant in the course of pursuing his whistleblower complaint." Slip op. at 1, quoting Complainant's Deposition Notice and Respondent's Motion. Respondent objected, arguing that Complainant was not seeking information relevant to his whistleblowing retaliation claims but EPA's procedures for complying with Federal records management requirements and its electronic record keeping capabilities. The ALJ denied the objection, holding that the information sought "could reasonably lead to the discovery of evidence that would be admissible at the hearing."

[Nuclear & Environmental Whistleblower Digest VII B 5]
**SUBPOENA; AUTHORITY OF ALJ TO ISSUE; *TOUHY* REGULATIONS**

The District of Columbia U.S. District Court held in ***Bobreski v. U.S. Environmental Protection Agency***, 284 F.Supp.2d 67 (D.D.C. 2003), that DOL ALJs do not have the authority to issue subpoenas in CAA, SDWA, SWDA, CERCLA, WPCA, and TSCA whistleblower cases. The court also held that EPA's denial of the Complainant's request for an investigator's testimony under EPA's *Touhy* regulations was not arbitrary and capricious.

[Nuclear & Environmental Whistleblower Digest VII B 5]
**SUBPOENA; MOTION TO COMPEL DEPOSITION OF FORMER EMPLOYEE**

In ***Kaufman v. U.S. Environmental Protection Agency***, 2002-CAA-22 (ALJ Aug. 5, 2003), Complainant served a subpoena on a former EPA official. Although Complainant alleged that the former official was still retained as a paid consultant, Respondent presented a declaration under penalty of perjury that such was not the case, whereas Complainant's allegation was based on unsubstantiated second-hand information. Thus, the ALJ found that there was no employment relationship between Respondent and the former official such that Respondent had no control over the former official. Accordingly, the ALJ denied Complainant's motion to compel discovery.

[Nuclear & Environmental Whistleblower Digest VIII A 4]
**JURISDICTION TO DETERMINE JURISDICTION**

A tribunal can assume jurisdiction for the purpose of determining whether it has jurisdiction to hear a case. ***Migliore v. Rhode Island Dept. of Environmental Management***, ARB No. 99-118, ALJ Nos. 1998-SWD-3, 1999-SWD-1 and 2 (ARB July 11, 2003). In ***Migliore*** the ARB assumed jurisdiction to rule on motions relating to the Assistant Secretary for OSHA's authority to intervene to cure a state sovereign immunity bar to a DOL whistleblower suit.

[Nuclear & Environmental Whistleblower Digest VIII B 1 d]
**AUTHORITY OF ARB TO RECONSIDER ITS DECISIONS**

In ***Ruud v. USDOL***, 80 Fed Appx 12, No. 02-71742 (9th Cir. Oct. 22, 2003) (unpublished) (case below ARB No. 99-023, ALJ No. 1988-ERA-33), the Ninth Circuit held that the law of the case doctrine did not prevent the ARB from reconsidering its prior decision to disapprove the settlement in the case because the agency's own precedents permitted such reconsideration if the previous decision was erroneous.

[Nuclear & Environmental Whistleblower Digest VIII B 1 d]
**JURISDICTION TO DETERMINE JURISDICTION**

*See* ***Migliore v. Rhode Island Dept. of Environmental Management***, ARB No. 99-118, ALJ Nos. 1998-SWD-3, 1999-SWD-1 and 2 (ARB July 11, 2003), casenoted at VIII A 4.

[Nuclear & Environmental Whistleblower Digest VIII B 2]
**ARB DOES NOT HAVE THE AUTHORITY TO RULE ON THE VALIDITY OF REGULATIONS**

The ARB is bound by the regulations duly promulgated by the Department of Labor, and is not authorized to rule on the validity of those regulations. Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272, 64,273 (Oct. 17, 2002). ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003) (ARB sitting by special designation on appeal from disqualification) (challenge to validity of disqualification of counsel provision at 29 C.F.R. § 18.34).

[Nuclear & Environmental Whistleblower Digest VIII B 2 a]
**CREDIBILITY DETERMINATIONS; ARB WILL NOT DISTURB ABSENT SOME FLAW OR SIGNIFICANT OMISSION IN ALJ'S EXPLANATION**

In ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003), the ARB affirmed the ALJ's credibility determinations, observing that the ALJ observed the demeanor of the witnesses, lived with the case from its inception, and did not believe the testimony of Respondent's witnesses. The Board stated that "[a]bsent some flaw or significant omission in the ALJ's explanation for not believing this testimony, we have no reason to disturb the ALJ's conclusions." Slip op. at 8. The Board noted that the ALJ had explained in careful detail the extent to which he rejected this testimony based on the demeanor of the witnesses, and with equal care and detail, noted inconsistencies between this evidence and other, more plausible evidence. The Board noted that the ALJ explained how he analyzed conflicting evidence to reach the conclusions he did, and that

Respondent's objections did not identify flaws in his logic or failure to consider all the evidence.

[Nuclear & Environmental Whistleblower Digest VIII B 3]
**ADVISORY OPINIONS; ARB DECLINES TO ISSUE**

*See* ***Migliore v. Rhode Island Dept. of Environmental Management***, ARB No. 99-118, ALJ Nos. 1998-SWD-3, 1999-SWD-1 and 2 (ARB July 11, 2003), casenoted at XX E for the proposition that the ARB declines to issue advisory opinions.

[Nuclear & Environmental Whistleblower Digest VIII B 3]
**INTERLOCUTORY APPEAL; ARB VERY RELUCTANT TO INTERFERE WITH ALJ'S CONTROL OVER THE COURSE OF A HEARING**

In ***Saporito v. GE Medical Systems***, ARB No. 04-007, ALJ No. 2003-CAA-1 and 2 (ARB Nov. 25, 2003), Complainant sought an interlocutory appeal of the ALJ's order denying Complainant's motion to offer rebuttal testimony post-trial. The ALJ had also denied Complainant's request to certify the issue for interlocutory appeal.

The ARB declined to decide whether the ALJ's denial of certification was fatal to the interlocutory appeal, as Complainant had failed to articulate any ground sufficient to convince the ARB to depart from its strong policy against piecemeal appeals. Complainant argued that his appeal fell within the *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), collateral order exception – that the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." 437 U.S. at 468. Complainant argued that he has a "due process" right to present rebuttal witness testimony, but the ARB found that this is the substantive issue for which review was sought and that it was first necessary to determine whether procedurally interlocutory review was appropriate. The ARB found that it was not, observing that it is very reluctant to interfere with an ALJ's control over the course of the hearing, and that the ALJ's ruling was not effectively unreviewable on appeal.

[Nuclear & Environmental Whistleblower Digest VIII C 2]
**COURT OF APPEALS JURISDICTION; WHERE AGENCY DECISION IS BASED ON MORE THAN ONE STATUTE, ONE OF WHICH PROVIDES FOR DIRECT APPEAL TO THE COURT OF APPEALS, COURT OF APPEALS SHOULD ENTERTAIN CONSOLIDATED REVIEW**

In ***Ruud v. USDOL***, 347 F.3d 1086 (9th Cir. 2003) (Case below ARB No. 99-023, ALJ No. 1988-ERA-33), the Complainant had taken an appeal of the ARB's decision to approve the settlement of his case, which had been based on the whistleblower provisions of both the CAA and the CERCLA. While the CAA provides for direct review in the court of appeals, CERCLA does not. The court held that "the court of appeals should entertain a petition to review an agency decision made pursuant to the agency's authority under two or more statutes, at least one of which provides for direct review in the courts of appeals, where the petition involves a common factual background and raises a common legal issue." The court declined to decide whether its jurisdiction in such a situation is concurrent or exclusive.

[Nuclear & Environmental Whistleblower Digest IX B 2]
**ARB PLEADING REQUIREMENTS; DISMISSAL OF APPEAL WHERE COMPLAINANT FAILED TO TIMELY FILE APPELLATE BRIEF OR STATE BASIS FOR APPEAL IN PETITION FOR REVIEW**

In ***High v. Lockheed Martin Energy Systems, Inc.***, ARB No. 02-091, ALJ No. 2002-CAA-1 (ARB Nov. 24, 2003), Complainant appealed an ALJ's Recommended Decision and Order. The ARB dismissed the appeal because the petition for review did not indicate how the ALJ's recommendation of dismissal was in error and because Complainant did not file a brief in support of the appeal.

[Nuclear & Environmental Whistleblower Digest IX B 2]
**ARB PLEADING REQUIREMENTS; REPEATED FAILURE TO FILE DOCUMENTS WITH APPROPRIATE CAPTION AND IN THE FORM OF A MOTION RESULTS IN REJECTION OF FILING**

In ***Gass v. U.S. Dept. of Energy***, ARB No. 03-093, ALJ Nos. 2000-CAA-22 and 2002-CAA-2 (ARB July 11, 2003) and ***Slavin v. Office of Administrative Law Judges***, ARB No. 03-077, ALJ No. 2003-CAA-12 (ARB July 11, 2003), the ARB declined to accept for filing documents filed by Complainant's counsel where counsel had repeatedly refused to comply with the Board's requirements for proper filing. Specifically, counsel had previously been admonished to file requests for Board action in the form of a motion with an appropriate caption. In the instant cases, counsel filed letters requesting a modification in the briefing schedule which were neither in the form of a motion nor did they include the Board's docket number. The ARB returned the proffered filings to Complainant.

*To the same effect* ***Steffenhagen v. Securitas Sverige, AR****,* ARB No. 03-139, ALJ No. 2003-SOX-24 (ARB Sept. 30, 2003); ***Blodgett v. Tennessee Dept. of Environment & Conservation****,* ARB No. 03-138, ALJ No. 2003-CAA-15 (ARB Oct. 14, 2003); ***Somerson v. Mail Contractors of America***, ARB No. 03-055, ALJ No. 2002-STA-44 (ARB Nov. 25, 2003).

[Nuclear & Environmental Whistleblower Digest IX C]
**ADDITION OF PARTIES; DUE PROCESS CONSIDERATIONS UNDER 29 C.F.R. § 18.5(e)**

*See* ***Ewald v. Commonwealth of Virginia, Dept. of Waste Management***, ARB No. 02-027, ALJ No. 1989-SDW-1 (ARB Dec. 19, 2003), casenoted at II B 1 b.

[Nuclear & Environmental Whistleblower Digest IX M 2]
**APPEAL OF ATTORNEY DISQUALIFICATION WHERE CHIEF ALJ AND ASSOCIATE CHIEF ALJS MUST RECUSE; SPECIAL JURISDICTION OF ARB OVER SECTION 18.36 DISQUALIFICATION; JURISDICTION OVER SECTION 18.34 DENIAL OF APPEARANCE**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), Complainant's counsel had been disqualified pursuant to 29 C.F.R. § 18.36(b) of the OALJ Rules of Practice and Procedure. Although such a disqualification is appealable to the Chief ALJ, in the case at bar the Chief ALJ recused himself and jurisdiction of this appeal was conferred on the ARB by the Secretary's Order of Referral pursuant to

Section 18.1(b). The Board noted that the same circumstances requiring the Chief ALJ's recusal also applied to the Associate Chief ALJs.

[Editor's note: In ***Slavin***, the ARB also considered whether sanctions recommended by the ALJ under 29 C.F.R. § 18.34(g)(3) [denial of authority to appear ] could be upheld. *See* Slip op. at n.4. The OALJ Rules of Practice do not state the procedure for appeal of section 18.34(g)(3) sanctions as compared to the express interlocutory appeal to the Chief ALJ of a disqualification of an attorney under section 18.36. It would appear that issues relating to a section 18.34(g)(3) disqualification would normally carry with the underlying case and that in a matter under the ARB's usual jurisdiction it would be the appropriate review authority. In ***Slavin***, by the time the section 18.36 disqualification appeal was being considered by the ARB it also had the underlying whistleblower complaint before it.]

[Nuclear & Environmental Whistleblower Digest IX M 2]
**DISQUALIFICATION OF COUNSEL; AUTHORITY OF ALJ TO MAKE REFERRAL TO BOARD OF PROFESSIONAL RESPONSIBILITY**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003) (ARB sitting by special designation on appeal from disqualification), the ARB noted that the inclusion in an ALJ's order of disqualification of Complainant's counsel of a direction that a copy of the order and relevant portions of the case record be forwarded to the Board of Professional Responsibility for the State where the attorney is licensed was "consistent with the reporting by Federal courts and agencies of attorney misconduct and disciplinary sanctions against attorneys to licensing jurisdictions, as an aid to state bar authorities in the exercise of their oversight responsibilities. *See generally* ABA Model Code of Judicial Conduct, Canon 3D, Disciplinary Responsibilities; 61 Fed. Reg. 65323, 65330-31 (Dec. 12, 1996) (Final rule, 29 C.F.R. Part 102, National Labor Relations Board, discussing NLRB policy of notifying state bar authorities of disciplinary sanctions the agency has imposed on attorneys)."

[Nuclear & Environmental Whistleblower Digest IX M 2]
**DISQUALIFICATION OF COUNSEL; ALJ PROPERLY RETAINS CASE RECORD DURING APPEAL**

Where an appeal is taken from an order of disqualification of counsel under 29 C.F.R. § 18.36, the presiding ALJ properly retains the case record in order to resume adjudication of the underlying case. ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003). In ***Slavin***, the ARB had ordered the ALJ to provide copies of relevant documents and Complainant thereafter requested that the ALJ be ordered to forward the "complete" record to Complainant and her counsel. The ARB, however, found that the ALJ had complied with its earlier order, and declined to grant Complainant's request.

[Nuclear & Environmental Whistleblower Digest IX M 2]
**ATTORNEY QUALIFICATIONS AND BEHAVIOR; DISTINCTIONS BETWEEN AND IMPLICATIONS OF SECTIONS 18.34(g)(3) and 18.36**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), the ARB explained the differing policies served by and procedures employed by the OALJ Rules of Practice regarding an attorney's professional standing, 29 C.F.R. § 18.34(g)(3), and conduct during a case adjudicated before OALJ, 29 C.F.R. § 18.36. Section 18.34(g)(3) authorizes denial of an attorney's authority to represent a party based on

a lack of certain enumerated qualifications, and provides for notice of and opportunity for a hearing on the matter. Reviewing the decision and subsequent remand order in *Rex v. Ebasco Services*, 1987-ERA-6 and 40, the ARB concluded that the Secretary of Labor had ruled that a formal hearing is contemplated under that regulation, with DOL bearing "the burden of proving, by a preponderance of the evidence, the allegations of misconduct against the attorneys reflects the gravity of a bar under Section 18.34(g)(3)...." Section 18.36, which addresses exclusion of a representative from further participation in a particular case being adjudicated before an ALJ, however, contemplates a more summary process. That section only requires that the case record reflect the reason for the ALJ's exclusion of the attorney; the appeal is to the Chief ALJ* with no suspension of the underlying case during the appeal.

The ARB observed that exclusion from participation in a particular case under section 18.36 has less far reaching implications than disqualification under section 18.34(g)(3), which bars an attorney from representing parties in future cases.

The ARB observed that the summary procedure of section 18.36 was similar to processes established by other Federal agencies for halting disruptive behavior that would otherwise defeat the conduct of orderly proceedings.

_____

* In *Slavin*, the Chief ALJ had recused himself because of professional and personal relationship with Mr. Slavin's client, and the Secretary had designated the ARB to hear the appeal.

[Nuclear & Environmental Whistleblower Digest IX M 2]

**DISQUALIFICATION UNDER SECTION 18.34(g)(3) REQUIRES NOTICE OF OPPORTUNITY FOR A FORMAL HEARING**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), the ARB found that an ALJ's disqualification of an attorney under section 18.34(g)(3) without notice of an opportunity for a formal hearing does not comply with that regulation's procedural requirements, and therefore declined to uphold the ALJ's order barring counsel from appearing as a representative or serving in an advisory capacity to a party in any matter to come before the ALJ in the future. In contrast, the ALJ's order to show cause and other actions [prior admonishment to refrain from certain behaviors; consideration of documents filed with the ARB as possibly being responsive to the order to show cause] clearly provided adequate notice under section 18.36.

In a concurring opinion, one member of the Board further explained how the procedure followed by the ALJ was defective under section 18.34(g)(3), suggesting that the primary defect was that the ALJ's order to show cause only provided notice of the charges and not the opportunity to request a hearing:

> Although Attorney Slavin's conduct may well have violated the substantive portions of § 18.34(g)(3), it is unnecessary to address that question. ALJ Cregar did not satisfy the regulation's procedural requirements. Under § 18.34(g)(3), an ALJ must afford "notice" and "opportunity for hearing" before the ALJ can deny a representative authority to appear. Although the show cause order was likely adequate notice of the charges, ALJ Cregar did not schedule the issue for a hearing or afford Attorney Slavin

> the opportunity to request one before denying him the authority to appear. Disqualification under 29 C.F.R. § 18.34(g)(3) is therefore procedurally defective and must be reversed.
>
> My colleagues appear to adopt an expansive view of 29 C.F.R. § 18.34(g)(3) that is not found in the text or the interpretive caselaw; and I write separately out of concern that their position will be misinterpreted. The text of § 18.34(g)(3) says hearing not formal hearing, *see* Majority Opinion at 11-12, by which I take it my colleagues mean "evidentiary hearing." *Rex v. Ebasco Services*, 87-ERA-6, -40 (Sec'y Mar. 4, 1994) held only that an ALJ is limited to the remedies available under 29 C.F.R. § 18.34(g)(3) and § 18.36 and may not import Rule 11 from the Federal Rules of Civil Procedure to award attorney's fees as a sanction. *Rex v. Ebasco Services*, 87-ERA-6, -40 (Sec'y Oct. 3, 1994) ruled that the Chief ALJ could designate a single ALJ to rule on the fitness of two counsel to appear generally in DOL cases. *Rex* did not delimit the nature or scope of any such hearing.
>
> In my view, 29 C.F.R. § 18.34(g)(3) does not mandate that a different ALJ conduct the disqualification hearing than the one assigned to the merits of the case; that the hearing must be an evidentiary hearing (e.g., where the facts are not in dispute); that the use of the word "hearing" would authorize calling the ALJ seeking disqualification as a witness (as Attorney Slavin seems to suggest by noting ALJ Cregar on his witness list); or that a denial of authority to appear in one case under § 18.34(g)(3) necessarily applies to all other cases (e.g., where there is a conflict of interest in only one case). I conclude only that ALJ Cregar failed to afford Attorney Slavin an opportunity for a hearing as § 18.34(g)(3) requires and consequently that regulation cannot provide a basis for denying Attorney Slavin the authority to represent the Complainant in the *Greene* whistleblower case and from representing any other party in any other case that might come before ALJ Cregar. However, a remand to ALJ Cregar to conduct a hearing is not required, since I also hold that 29 C.F.R. § 18.36 afforded the ALJ a sufficient independent basis for disqualifying counsel in the *Greene* whistleblower case.

[Nuclear & Environmental Whistleblower Digest IX M 2]

**ATTORNEY DISQUALIFICATION; FILING OF INTERLOCUTORY APPEAL WITH ARB ON ANOTHER ISSUE DOES NOT DIVEST ALJ OF AUTHORITY TO ISSUE DISQUALIFICATION ORDER**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), the ARB ruled that the filing of an interlocutory appeal contesting the presiding ALJ's denial of recusal does not divest the ALJ of jurisdiction to issue an Order of Disqualification of

counsel under 29 C.F.R. § 18.36. The ALJ had previously issued an order to show cause under section 18.36. The ARB observed that the "Petitioners' contention that the ALJ was divested of jurisdiction is tantamount to a suggestion that a party whose representative has provoked an ALJ to take action under Section 18.36 can easily thwart the ALJ's authority by filing an interlocutory appeal with the ARB. Such practice would undermine the ALJ's obligation to ensure the orderly conduct of the hearing and the timely resumption of proceedings following a Section 18.36 exclusion."

[Nuclear & Environmental Whistleblower Digest IX M 2]

**FAILURE TO RESPOND TO ORDER TO SHOW CAUSE UNDER SECTION 18.36 RESULTS IN WAIVER OF RIGHT TO CONTEST FACTS IN LATER PROCEEDINGS**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), neither Complainant nor her counsel responded to the presiding ALJ's order to show cause why counsel should not be disqualified under 29 C.F.R. § 18.36. On appeal, the petitioners requested that the ARB conduct a formal hearing on their allegation of impropriety in the assignment of the presiding judge. The ARB observed that section 18.36 does not provide any guidance on the procedures to be following on appeal of a section 18.36 disqualification. The ARB found that the contentions relating to assignment of the presiding judge were not relevant, and that the petitioner's failure to respond to the presiding ALJ's order to show cause was a failure to contest the facts cited in support of the order to show cause by the ALJ. The ARB therefore held that "[t]he Petitioners also waived their right to contest those facts at a later stage of the proceeding. Cf. 29 C.F.R. § 18.5(b), (d)(1) (Responsive pleadings – answer and request for hearing, Default; Orders to Show Cause)."

[Editor's note: Although presented as an issue of waiver of the right to an evidentiary hearing on appeal for failure to respond to an order to show cause, a more fundamental question is whether there is any right to such an evidentiary hearing during a section 18.36(b) appeal, or whether such an appeal is more in the nature of typical appellate review. The concurring opinion in ***Slavin*** stated that he was reviewing the ALJ's finding of fact *de novo*. The concurring opinion also stated that in a hearing on counsel's disqualification, counsel would not have the right to call the presiding judge as a witness to testify about the circumstances of his appointment and qualifications to preside over the underlying case.]

[Nuclear & Environmental Whistleblower Digest IX M 2]

**ORDER OF DISQUALIFICATION; STATEMENT IMPUNGING THE INTEGRITY OF OALJ AND THE PRESIDING ALJ WITH RECKLESS DISREGARD FOR THE TRUTH**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), the ARB found that the presiding ALJ properly disqualified Complainant's counsel under 29 C.F.R. § 18.36 where – among other reasons – the record established that counsel "acted for reckless disregard for the truth when he asserted that improper contacts between DOL OALJ and the ALJ occurred and facilitated a conspiracy to deny the Complainant a full and fair hearing in her whistleblower complaint." In so ruling, the ARB stated their agreement with the ALJ's discussion that "an attorney who impugns the integrity of a judge based on 'personal feelings or belief, innuendo, suppositions, or rumors, or '"jumping to conclusions"' instead of a sound factual basis acts recklessly and unprofessionally."

The ARB did not reach the ALJ's finding that counsel had knowingly made the false statements in view of its affirmance of the ALJ's alternative finding that counsel made the statements with reckless disregard for their truth.

[Nuclear & Environmental Whistleblower Digest IX M 2]
**ORDER OF DISQUALIFICATION; OFFENSIVE STATEMENTS IN PLEADINGS**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), the ARB found that the presiding ALJ properly disqualified Complainant's counsel under 29 C.F.R. § 18.36 for – among other reasons – making statements in pleadings that are personally offensive to the ALJ, other Federal officials and opposing counsel. The ARB agreed with the ALJ's discussion that "such statements are readily distinguishable from assignments of error, which properly specify a ruling and frame arguments regarding that ruling in terms of relevant legal standards." The ARB wrote:

> The Petitioners assert that the objectionable statements about the ALJ were "fully justified by his refusal to conduct an on-the-record conference call[], the threatening manner of his off-the-record conference call followed by an eight-page order intimidating, coercing and restraining protected activity; his violations of the First Amendment; and his violation of Judge Greene's rights." Comp. July 16, 2002 Resp. to Prehearing Ord. at 19. The Petitioners' contention is based on a premise that is completely at odds with the standards governing attorney conduct. It is well settled that an attorney is not relieved of his professional obligation to show respect for a hearing officer because the officer issues rulings or takes other action that the attorney views as erroneous. *See, e.g., Office of Disciplinary Coun. v. Mills*, 755 N.E.2d 336, 338 (Ohio 2001). When a representative believes that a hearing officer has committed error in his conduct of proceedings, the proper course is for the representative to respectfully pursue the appropriate challenge, articulated in terms of relevant legal authority, through legitimate channels. *See Bieber v. Dep't of the Army*, 287 F3d 1358, 1361-64 (Fed. Cir. 2002) (addressing challenge to administrative judge's conduct of hearing under 5 U.S.C. § 556(b)); *see also MacDraw, Inc. v. CIT Group Equip. Fin.*, 994 F.Supp. 447, 459-61 (S.D.N.Y. 1997) (observing that attorney in the case has "a history of accusing judges of bias or prejudging cases" and discussing the proper manner in which an attorney who has a reasonable basis should pursue a bias charge).

(footnote omitted).

[Nuclear & Environmental Whistleblower Digest IX M 2]
**ORDER OF DISQUALIFICATION; REFUSAL TO COMPLY WITH ALJ'S ORDER REGARDING PROPER CITATION OF LEGAL AUTHORITY**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), the ARB found that the presiding ALJ properly disqualified Complainant's counsel under 29

C.F.R. § 18.36 for – among other reasons – counsel's failure to comply with the ALJ's directive to representatives for both parties to use proper citation to authorities.

[Nuclear & Environmental Whistleblower Digest IX M 2]
**DISQUALIFICATION OF COUNSEL; RELEVANCE OF PRIOR MISCONDUCT**

In ***In re Slavin***, ARB No. 02-109, ALJ No. 2002-SWD-1 (ARB June 30, 2003), the majority opinion found that the presiding ALJ had properly disqualified Complainant's counsel under 29 C.F.R. § 18.36 for overstepping the bounds of zealous representation and responsible criticism of judges and the legal system, and for failing to follow the ALJ's directives regarding the use of emotionally-laden and offensive language in pleadings and regarding the proper use of citations to legal authority. The majority wrote: "The foregoing grounds, along with the history of unprofessional conduct engaged in by Counsel in previous cases and Counsel's failure to respond to the ALJ's OSC, provide more than adequate support for the ALJ's exclusion of Counsel from further participation in the *Greene* case."

In a concurring opinion, one member of the Board wrote:

> I would use the cumulative effect of past misconduct as a factor in considering a permanent denial of authority to appear after notice and hearing under 29 C.F.R. § 18.34(g)(3). However, the fact that a lawyer has been disqualified, sanctioned, or cited for improper professional conduct in other cases has little probative value on the question of whether he has engaged in separate misconduct in the case in which an ALJ is considering his disqualification. Nevertheless, in determining whether there were grounds for disqualifying Attorney Slavin under § 18.36, the fact that he may have been disqualified, sanctioned, or cited for improper professional conduct in eight other cases could be considered on the issue of notice; he knew or should have known that his failure to conform to norms of ethics and civility and his failure to obey court rulings could lead to his being sanctioned or removed. Therefore, to the extent that the ALJ considered prior misconduct to prove present misconduct under § 18.36, I believe that was error. Regardless, counsel's conduct in the *Greene* whistleblower case provided sufficient grounds for his disqualification under § 18.36, without consideration of alleged misconduct in other cases.

[Nuclear & Environmental Whistleblower Digest XI B 2 c]
**LEGITIMATE, NON-DISCRIMINATORY REASON; COMPLAINANT NOT REHIRED BECAUSE HE DID NOT INTERVIEW AS WELL AS OTHER APPLICANTS**

In ***Higgins v. Alyeska Pipeline Service Corp.***, ARB No. 01-022, ALJ 1999-TSC-5 (ARB June 27, 2003), Complainant alleged that he was not hired for a position with Respondent because of his previous protected activities. Complainant and 11 other applicants (from a field of over 100 applicants) were interviewed by telephone by a three member panel. The panel scored the applicants and Complainant was not selected for a personal interview with the senior executive, who limited interviews to

the top 4 applicants. The ARB determined that the record convincingly showed that Complainant's performance in the interview was so poor that he would not have advanced to the next level under any variation of the scoring by the 3 panelists. The panelists all had previously worked with Complainant; the ARB observed that Complainant did not object to any member being part of the interviewing panel even though he knew of two members' participation several weeks before the interview.

[Nuclear & Environmental Whistleblower Digest XI B 2 c]
**LEGITIMATE NONDISCRIMINATORY REASON; BLACKLISTING; OIG INTERVIEW IN INVESTIGATION RELATING TO FECA CLAIM; PRIVILEGED COMMUNICATION**

In ***Pickett v. Tennessee Valley Authority***, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18 (ARB Nov. 28, 2003), Complainant alleged that Respondent blacklisted him when an OIG investigator visited an employer for whom Complainant had worked part-time to ask questions relating to an OWCP request for information about the employment needed to determine its potential effect the amount of disability benefits Complainant received under FECA. Complainant alleged that that the visit was in retaliation for a 1999 whistleblower complaint – that the investigation was an "illegal" investigation of his disability claim, and that the investigator had made blacklisting comments during the visit.

The ARB held that TVA established a legitimate, nondiscriminatory reason for the investigator's interview of the employer, as it was properly authorized as a discretionary function within the scope of his authority as an OIG special agent. TVA also argued that its actions were protected under a qualified privilege. The ARB noted that certain factual circumstances of the case met some of the requirements of the common-law privilege in defamation for certain communications, but found that in view of its findings of a legitimate, nondiscriminatory reason for the actions, it was not necessary to decide whether such a privilege would apply.

[Nuclear & Environmental Whistleblower Digest XI B 3]
**UTILITY OF PRIMA FACIE CASE ANALYSIS AFTER CASE HAS BEEN FULLY TRIED ON THE MERITS**

Once a case has been fully tried on the merits, the ALJ does not determine whether a prima facie showing has been established but rather whether the complainant has proved by a preponderance of the evidence that the employer retaliated against him because of protected activity. The ARB discourages the unnecessary discussion of whether a whistleblower has established a prima facie case when the case has been fully tried. ***Pickett v. Tennessee Valley Authority***, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18 (ARB Nov. 28, 2003).

[Nuclear & Environmental Whistleblower Digest XI C 1]
**RETALIATORY MOTIVE; COMPLAINANT'S BURDEN TO ESTABLISH THAT AGENCY'S EXPLANATION OF LAWFUL MOTIVE IS NOT CREDIBLE**

In ***Pickett v. Tennessee Valley Authority***, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18 (ARB Nov. 28, 2003), the ARB found that Complainant had failed to establish by a preponderance of the evidence that purported blacklisting engaged in by a TVA OIG investigator during an interview of an employer who had engaged Complainant in part-time work was motivated in whole or in part by Complainant's protected activity under the environmental whistleblower statutes, where the

investigator was asking questions about the employment pursuant to a request from OWCP relating to the Complainant's FECA disability award. The Board considered the evidence of record, and – reversing the ALJ -- found that if the investigator had any actual animus toward Complainant, it stemmed from the disability case.

[Nuclear & Environmental Whistleblower Digest XI D 1]
**DUAL MOTIVE; EMPLOYER'S BURDEN HIGHER UNDER ERA THAN CAA**

Where a complainant has established that protected activity was a contributing factor in an unfavorable personnel decision, Congress has specifically placed a higher "clear and convincing evidence" burden on the employer in ERA whistleblower cases to demonstrate that it would have taken the same unfavorable personnel action in absence of such behavior. In CAA cases, however, the employer's burden is only "a preponderance of the evidence." ***Martin v. Azko Nobel Chemicals, Inc.***, ARB No. 02-031, ALJ No. 2001-CAA-16 (ARB July 31, 2003).

[Nuclear & Environmental Whistleblower Digest XI D 2]
**MIXED MOTIVE; NO INVOCATION WHERE ACTIONS WERE NOT SHOWN TO BE ADVERSE OR WHERE ADVERSE ACTION WAS NOT SHOWN TO BE IMPROPERLY MOTIVATED; COMPLAINANT MAY BE ASKED TO IMPROVE FORM OF COMMUNICATION**

In ***Dierkes v. West Linn-Wilsonville School District***, ARB No. 02-001, ALJ No. 2000-TSC-2 (ARB June 30, 2003), the ARB rejected Complainant's argument that the ALJ had erred in failing to apply the mixed motive analysis where the actions and statements of Respondent complained about by Complainant either did not entail tangible job consequences (and therefore could not be considered adverse action) or where the one adverse job action – imposition of a Goal in Complainant's performance evaluation standards for more professional communication – was not shown to have been imposed because of Complainant's activities as an environmental activist (even though there was temporal proximity). Rather, the record contained a plethora of e-mails demonstrating Complainant's recurring problems in interpersonal communications. The ARB also observed that Complainant, a kindergarten teacher who had raised issues about PCBs and asbestos in the school, had sent an e-mail to the principal asking what percentage of her alleged communications difficulties he attributed to her activism. The principal responded that while Complainant's "concerns and questions about environmental issues were important in removing PCBs and asbestos from the school, her 'demeanor and tone [had] vacillated between calm inquiry and angry outbursts,' and he still would have encouraged her to improve in communicating professionally even if the events of the summer had not occurred." The ARB thus concluded that

> The fact that the unprofessional communications encompassed Dierkes' environmental concerns as well as her employment and career issues does not make this a dual motive case. No mixed motive analysis is required because Dierkes has not proven that there was a discriminatory reason for imposing Goal Three.[5]

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> [5]We note that, consistent with the legitimate non-discriminatory reason proffered for imposing Goal Three (i.e., Dierkes' unprofessional pattern of communication),

> the goal focused on the form of her communications with others, not the content. Dierkes has not shown that the Respondent's rationale was pretextual.

[Nuclear & Environmental Whistleblower Digest XIII A]
**ADVERSE ACTION; TANGIBLE EFFECT OR CONSEQUENCES**

In ***Martin v. Azko Nobel Chemicals, Inc.***, ARB No. 02-031, ALJ No. 2001-CAA-16 (ARB July 31, 2003), the ALJ described an adverse action as "an unfavorable personnel action." The ARB stated that this description "does not fully express the need for the action to have a 'tangible' effect or consequence in order to qualify as conduct prohibited under the [CAA]." Slip op. at n.3 (citations omitted).

[Nuclear & Environmental Whistleblower Digest XIII B 1]
**BLACKLISTING; COMPLAINANT'S BURDEN NOT ESTABLISHED BY EQUIVOCAL EVIDENCE**

In ***Pickett v. Tennessee Valley Authority***, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18 (ARB Nov. 28, 2003), Complainant alleged that Respondent blacklisted him when an OIG investigator visited an employer for whom Complainant had worked part-time to ask questions relating to an OWCP request for information about the employment needed to determine its potential effect on the amount of disability benefits Complainant received under FECA. Complainant alleged that that the visit was in retaliation for a 1999 whistleblower complaint – that the investigation was an "illegal" investigation of his disability claim, and that the investigator had made blacklisting comments during the visit.

The ARB found that the investigator's statements during the visit had not been proved by a preponderance of the evidence to be blacklisting. For instance, the testimony on Complainant's allegation that the investigator had accused Complainant of malingering could have been interpreted as supporting an inference of malingering – or as a ploy to motivate the employer to provide full employment information about Complainant – or as gratuitous remarks. The testimony provided only equivocal evidence. Complainant alleged that the investigator ridiculed Complainant for living at home at an age of 36, but the ARB observed that such a comment is simply unrelated to employment qualifications.

[Nuclear & Environmental Whistleblower Digest XIII B 1]
**BLACKLISTING; DEFINITION**

In ***Pickett v. Tennessee Valley Authority***, ARB Nos. 02-056 and 02-059, ALJ No. 2001-CAA-18 (ARB Nov. 28, 2003), the ARB described the definition of blacklisting. Observing that the regulation at 29 C.F.R. § 24.2(b) specifically mentions blacklisting as a violation of the employee protection provisions, the Board wrote:

> A blacklist is defined as a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate. *Leveille v. New York Air National Guar*d, Case No. 94-TSC-3, slip op. at 18-19 (Sec'y Dec. 11, 1995); *see Black's Law Dictionary* 154 (5th ed. 1979). ...

> A blacklisting may also arise "out of any understanding by which the name or identity of a person is communicated between two or more employers in order to prevent the worker from engaging in employment." 48 Am. Jur. 2d, *Labor and Labor Relations* § 669 (2002). Blacklisting occurs when an individual or a group of individuals acting in concert disseminates damaging information that affirmatively prevents another person from finding employment. *Barlow v. U.S.*, 51 Fed.Cl. 380, 395 (2002) (citation omitted).
>
> Blacklisting assumes that an employer covertly follows a practice of discrimination. *Black's Law Dictionary* 163 (7th ed. 1999)….
>
> However, in *Odom v. Anchor Lithkemko*, Case No. 96-WPC-1, slip op. at 13 (ARB Oct. 10, 1997), the ARB emphasized that an employer is not prohibited from providing a negative reference simply because an employee has filed a whistleblower complaint. To be discriminatory, the communication must be motivated at least in part by the protected activity. . . .
>
> In addition, blacklisting requires an objective action—there must be evidence that a specific act of blacklisting occurred. *See Howard v. Tennessee Valley Authority*, Case No. 90-ERA-24 (Sec'y July 3, 1991), *aff'd sub nom., Howard v. U.S. Dept. of Labor*, 959 F.2d 234 (6th Cir. 1992) (table)…. Subjective feelings on the part of a complainant toward an employer's action are insufficient to establish that any actual blacklisting took place. *See Bausemer v. Texas Utilities Electric*, Case No. 91-ERA-20, slip op. at 8 (Sec'y Oct. 31, 1995) (an employer's letters to contractors requesting notice of any discrimination cases filed against them did not constitute blacklisting of complainant).
>
> Under *Smith v. Tennessee Valley Authority*, Case No. 90-ERA-12, slip op. at 4 (Sec'y Apr. 30, 1992), an allegation of blacklisting must include some form of detriment to the complainant. Thus, there must be some objectively manifest personnel or other injurious employment-related action by the employer against the employee, proved directly or circumstantially, to support a claim of illegal action under the statute. *McDaniel v. Mead Corp.*, 622 F. Supp. 351, 358 (W.D. Va. 1985), *aff'd*, 818 F.2d 861 (4th Cir. 1987) (table).

Slip op. at 8-9.

[Nuclear & Environmental Whistleblower Digest XIII B 1]
**BLACKLISTING; STATEMENT OF RESPONDENT'S COUNSEL IN POST-HEARING BRIEF**

In ***Erickson v. U.S. Environmental Protection Agency***, 2003-CAA-11 and 19, 2004-CAA-1 (ALJ Nov. 13, 2003), Complainant alleged, *inter alia*, that Respondent's counsel blacklisted her by referring to her in a post-hearing brief as being insubordinate when none of Respondent's supervisors accused her of such misconduct. The ALJ, however, dismissed this complaint because of a lack of legal authority for finding that such action creates a cause of action. The ALJ observed that Supreme Court authority provides government counsel with "an absolute privilege for any courtroom statement relevant to the subject matter of the proceeding." Slip op. at n.1, quoting *Imbler v. Pachtman*, 424 U.S. 409, 426 n.23 (1976).

[Nuclear & Environmental Whistleblower Digest XIII B 18]
**ADVERSE EMPLOYMENT ACTION AND HOSTILE WORK ENVIRONMENT; FAILURE TO REINSTATE; WITHHOLDING INFORMATION NECESSARY TO PERFORM JOB; IDLING; DISCOURAGING EMPLOYEES FROM PURSUING OLD CONCERNS; ATTENTION TO ABSENTEEISM**

In ***Erickson v. U.S. Environmental Protection Agency***, 2003-CAA-11 and 19, 2004-CAA-1 (ALJ Nov. 13, 2003), the ALJ had earlier issued a lengthy recommended decision finding in part in favor of Complainant on issues of adverse employment and hostile working conditions. The instant complaints alleged that 19 additional actions by Respondent were adverse employment and hostile work. Finding that some of the actions were adverse employment actions or created a hostile work environment and that some were not in violation of the whistleblower laws, the ALJ essentially found that Respondent's failure to reassign Complainant to other duties as required by the reinstatement order of the first decision, and certain other actions, constituted pervasive harassment constituting adverse action and hostile working conditions. The decision is too detailed for a fully descriptive summary, but rulings of note include:

- Withholding information necessary for job performance constitutes a hostile work environment.

- A supervisor's leaving post-it notes on Complainant's door when he could not find her in her office and questioning her about absences was not, under the circumstances, an adverse personnel action but routine and necessary supervisory actions.

- Idling of Complainant (*i.e.*, failing to assign enough duties to keep Complainant fully occupied) was adverse employment action in that it deprived her of meaningful work.

- Respondent's appeal of the earlier recommended decision was not adverse action, but refusal to reassign Complainant as ordered and continued harassment was.

- A new manager's statement in an introductory meeting announcing new leadership and seeking a "clean slate" created a hostile work environment where, reviewing the

> entire record, the new manager essentially told employees he would only address issues which arose after his appointment and that employees who held onto the past would do so to their detriment and those who did not like their present assignment should seek another job.

[Nuclear & Environmental Whistleblower Digest XIII C]
**HOSTILE WORK ENVIRONMENT; TENSION FROM ENVIRONMENTAL ACTIVISM MUST BE SHOWN TO HAVE RESULTED IN INTENTIONAL DISCRIMINATION -- SEVERE OR PERVASIVE ENOUGH TO ALTER THE CONDITIONS OF EMPLOYMENT AND AFFECT A REASONABLE PERSON DETRIMENTALLY**

In ***Dierkes v. West Linn-Wilsonville School District***, ARB No. 02-001, ALJ No. 2000-TSC-2 (ARB June 30, 2003), Complainant was a kindergarten teacher who raised concerns about PCBs and asbestos in the school. She argued that the tension resulting from her environmental activism resulted in a hostile work environment. The ARB, however, found that the record did not establish a hostile work environment, agreeing with the ALJ's findings that the actions and statements cited by Complainant as contributing to an abusive working environment were either not established as adverse or were part of the normal feedback between supervisor and employee. The Board considered the circumstances of the case, including Complainant's colleagues' heated expressions of disagreement with Complainant's viewpoint, but found that they did not demonstrate a regular or pervasive enough activity to alter the conditions of her employment and create an abusive work environment. The ARB found that staff e-mails were not abusive, physically threatening or humiliating and that although fellow teachers and the principal expressed strong disagreement with Complainant's position and actions – both in writing and at a public meeting called by the union – they did not encourage each other to ostracize Complainant and said nothing about her personally. The ARB found that Complainant:

> failed to establish that she suffered intentional discrimination which was severe or pervasive enough to alter her conditions of employment and affect a reasonable person detrimentally. She also failed to demonstrate that the school district should be held accountable for the viewpoints of her co-workers and supervisors concerning the environmental problems at [the school].

Slip op. at 10.

[Nuclear & Environmental Whistleblower Digest XVI B 4]
**FRONT PAY; CANNOT BE PREMISED ON SPECULATION AS TO COMPLAINANT'S POSITION**

In ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003), the ARB declined to adopt the ALJ's recommendation of a front pay award where the record failed to support the ALJ's speculation that Complainant quit because of a hostile work environment. After the hearing but before the decision, Complainant had been awarded the position for which he had been earlier passed over. The person who had been awarded the position, to which the ALJ later found Complainant had been denied in part due to retaliation for protected activity, was promoted. Complainant subsequently quit but never placed

into the record information concerning the reasons for his leaving the employment. Since he provided no evidence as to why being awarded the position was not a sufficient make whole remedy, together with back pay, the ARB declined to award front pay.

[Nuclear & Environmental Whistleblower Digest XVI C 2 d]
**BACKPAY; COMPLAINANT SHOULD NOT BE PENALIZED FOR OVERTIME EARNINGS**

A backpay award should not be reduced for an employee who is paid by the hour and works overtime. Thus, in ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003), the ALJ erred in calculating backpay based on a memorandum showing Complainant's actual earnings for the relevant period and the salary of the position for which Complainant was illegally passed over, where Complainant's actual earnings included overtime pay. Rather, the ALJ should have compared the base pay for both positions.

[Nuclear & Environmental Whistleblower Digest XVI D 3 a]
**COMPENSTORY DAMAGES; EMOTIONAL DISTRESS MUST BE PROVEN**

Compensatory damages authorized by the whistleblower provision of the Clean Water Act may include damages for emotional distress. Emotional distress, however, is not presumed but must be proven. ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003).

[Nuclear & Environmental Whistleblower Digest XVI E]
**ATTORNEY'S FEES; ARB WILL NOT ALLOW REQUESTS FOR FEES TO BE DRAWN OUT AD INFINITIUM**

In ***Leveille v. New York Air National Guard***, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Dec. 16, 2003), the ARB denied Complainant's request to keep the record open for the filing of additional fee requests relating to the "ongoing need [for representation] as a result of the ARB's order on damages … for the payment of future medical expenses in the amount of $10,000." The Board had earlier admonished the litigants not to draw out attorney's fees requests "ad infinitium" and stated clearly that no further requests for attorney's fees would be allowed.

[Nuclear & Environmental Whistleblower Digest XVI E 2]
**ATTORNEY'S FEES; TIME SPENT ON ADVICE ON TAX CONSEQUENCES OF DAMAGE AWARD, DISCUSSIONS WITH RESPONDENT ON WHETHER IT WOULD APPEAL, AND COORDINATION OF PAYMENT OF DAMAGES IS NOT IN "LITIGATION" OF THE CASE AND NOT COMPENSABLE**

Time spent by a complainant's counsel on the question of the tax consequences of a damages award under the whistleblower provision of the TSCA is not compensable because it is not related to litigation of the case and therefore is not "reasonably incurred." See 42 U.S.C. § 7622(b)(2)(B)(2000). Once the complainant receives the monetary damages ordered by the ARB, the litigation of the case is at an end and the impact on the complainant's financial situation cannot be related to litigation of the case.

Time spend in correspondence and in conversation with Respondent's counsel to discern whether it would appeal the ARB's decision likewise has no reasonable

relationship to litigating the case and is not compensable. The same is true of time spend coordinating the payment of damages.

***Leveille v. New York Air National Guard***, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Dec. 16, 2003).

[Nuclear & Environmental Whistleblower Digest XVI E 3 d v]
**ATTORNEY'S FEES; NO DOWNWARD ADJUSTMENT FOR ULTIMATELY UNSUCCESSFUL ARGUMENT WHERE RAISED BELOW AND WHERE COMPLAINANT NEVERTHELESS ACHIEVED SIGNIFICANT REMEDIES**

In ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB Oct. 28, 2003), the ARB had affirmed the ALJ's recommended decision finding a violation of the whistleblower provision of the FWPCA, albeit it adjusted the backpay award upwards but rejected the ALJ's recommendation to award compensatory damages and front pay. Complainant's counsel filed an unopposed petition for attorney's fees. The ARB found the petition sufficiently detailed to award the full amount requested. The ARB declined to make a downward adjustment for work performed on the now unsuccessful argument concerning compensatory damages and front pay, noting that Complainant had achieved significant remedies and remained the prevailing party. The ARB also noted that the fee petition had not sought fees incurred for an unsuccessful argument raised for the first time on review and rejected by the ARB.

[Nuclear & Environmental Whistleblower Digest XVI E 3 d v]
**ATTORNEY'S FEES; FEES FOR PARTIALLY SUCCESSFUL RECONSIDERATION OF EARLIER FEE AWARD IN PROPORTION TO SUCCESS**

Where Complainant's attorney was partially successful in obtaining an increase in the amount of attorney's fees awarded in motions related to obtaining ARB reconsideration of its prior order on such fees, the Board permitted additional fees for such work in proportion to the increase in fees obtained. ***Leveille v. New York Air National Guard***, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Dec. 16, 2003) (earlier in the order, the Board discussed its admonishment in regard to the filings relating to the reconsideration – which has engendered a series of filings and orders -- that it would not permit additional briefing and further requests for fees; it appears that the proportionate reduction may have been influenced by this procedural history).

[Nuclear & Environmental Whistleblower Digest XVI E 4 a]
**ATTORNEY FEE APPLICATION; ALJ'S ISSUANCE OF RECOMMENDED DECISION PROPERLY WITHIN SCOPE OF HEARING RESPONSIBILTIES**

In ***Moder v. Village of Jackson, Wisconsin***, ARB Nos. 01-095 and 02-039, ALJ No. 2000-WPC-5 (ARB June 30, 2003), Respondent objected to the ALJ's recommended decision on attorney fees on the ground that such fees may be awarded only at the time the final decision and order is issued. The ARB observed that the ALJ's decision was only a recommendation, and that adjudication of the attorney fees petition was entirely within the scope of the ALJ's hearing responsibilities.

[Nuclear & Environmental Whistleblower Digest XVII G 4]
**SETTLEMENT; BAD FAITH (e.g., BREACH OF AGREEMENT) OF PARTY MAY BE CONSIDERED IN DETERMINING WHETHER TO APPROVE**

In ***Ruud v. USDOL***, 80 Fed Appx 12, No. 02-71742 (9th Cir. Oct. 22, 2003) (unpublished) (case below ARB No. 99-023, ALJ No. 1988-ERA-33), the Ninth Circuit held that the ARB erred when it concluded that it did not have jurisdiction to consider subsequent bad faith behavior (breach of the agreement) in the course of reviewing a settlement agreement under the whistleblower provision of the CAA. Rather, the court held that the Secretary of Labor "is free to determine that a settlement agreement is not fair, adequate and reasonable in light of a party's subsequent bad faith behavior, and in so doing does not infringe upon the jurisdiction of the district court to enforce such an agreement." Nonetheless, the court affirmed the ARB's approval of a settlement upon reconsideration based on the ARB's finding that its prior rejection of the settlement was inconsistent with "its own case law establish[ing] that breach of a settlement agreement is not a relevant consideration in the Secretary's decision whether to enter into a settlement agreement."

[Nuclear & Environmental Whistleblower Digest XVII G 9]
**SETTLEMENT; LAW OF THE CASE DOCTRINE DOES NOT PREVENT ARB FROM RECONSIDERING A PRIOR DISAPPROVAL OF A SETTLEMENT**

In ***Ruud v. USDOL***, 80 Fed Appx 12, No. 02-71742 (9th Cir. Oct. 22, 2003) (unpublished) (case below ARB No. 99-023, ALJ No. 1988-ERA-33), the Ninth Circuit held that the law of the case doctrine did not prevent the ARB from reconsidering its prior decision to disapprove the settlement in the case because the agency's own precedents permitted such reconsideration if the previous decision was erroneous.

[Nuclear & Environmental Whistleblower Digest XX E]
**STATE SOVEREIGN IMMUNITY; SUMMARY DECISION APPROPRIATE WHERE COMPLAINANT FAILS TO RAISE GENUINE ISSUE OF MATERIAL FACT FOR TRIAL; ARB REJECTS ARGUMENT THAT ALJ HEARING IS INVESTIGATORY RATHER THAN ADJUDICATORY IN NATURE**

The ALJ properly granted summary judgment where the Respondent was a political subdivision of the State of Georgia immune from prosecution by Complainant, a private citizen, under U.S. Const. Amend. XI. Complainant argued that the proceeding before the ALJ was not an adjudication but an investigation because under the CERCLA and SWDA whistleblower scheme only the Secretary of Labor makes the final decision of whether a violation has occurred and whether relief should be granted. The ARB found that the relevant case law made it clear that ALJ whistleblower hearings are adjudicatory. The ARB noted that the ALJ had assumed without evidence in the record that Respondent had not previously voluntarily waived its sovereign immunity, but that because it was Complainant's burden to establish through affidavits or otherwise a genuine issue of material fact, entry of judgment in favor of Respondent was proper. ***Cannamela v. State of Georgia Dept. of Natural Resources***, ARB No. 02-106, ALJ No. 2002-SWD-2 (ARB Sept. 30, 2003).

[Nuclear & Environmental Whistleblower Digest XX E]
**STATE SOVEREIGN IMMUNITY; NO EVIDENCE OF ABROGATION BY CONGRESS; MERE RECEIPT OF FEDERAL FUNDS AND ASSURANCES NOT TO DISCRIMINATE DO NOT ESTABLISH WAIVER; RAISING OF DEFENSE AFTER DEFENSE ON MERITS IS NOT UNTIMELY; RAISING DEFENSES ON THE MERITS IS NOT A CONSENT TO DOL JURISDICTION; LATE AMENDMENT OF COMPLAINT TO NAME AS PARTIES PERSONS IN THEIR INDIVIDUAL CAPACITIES**

Where a state does not consent to be sued in a DOL whistleblower proceeding under CERCLA, RCRA ("SWDA"), CWA ("FWPCA") and SWDA, state sovereign immunity bars such a suit unless the complainant demonstrates that Congress authorized the suit or that the state waived its immunity. ***Ewald v. Commonwealth of Virginia, Dept. of Waste Management***, ARB No. 02-027, ALJ No. 1989-SDW-1 (ARB Dec. 19, 2003). In ***Ewald***, the ARB found that Complainant presented no evidence to show to that Congress abrogated state immunity from CERCLA, RCRA, CWA and SDWA whistleblower complaints. Moreover, the ARB found that Virginia's participation in the Superfund program did not constitute waiver of its sovereign immunity under CERCLA. Mere receipt of federal funds does not establish a waiver; nor does a signed assurance by a state agreeing to abide by federal laws prohibiting various forms of discrimination as a condition to receiving federal program funds provide the express and equivocal language required to establish a waiver.

In ***Ewald***, Virginia did not raise the state sovereign immunity defense until about 10 years into the proceedings before DOL. Complainant argued, in essence, that the raising of the defense was untimely and that Virginia had voluntarily submitted to DOL jurisdiction by defending against the merits of her discrimination complaint. The ARB found that state sovereign immunity could be raised at any time during the proceedings, including on appeal. Moreover, the ARB found that a state's defense of a discrimination complaint by a private party in an administrative proceeding does not constitute a waiver of immunity.

The ARB declined Complainant's request for an ARB ruling that the Assistant Secretary of OSHA could intervene on her behalf.

Finally, Complainant sought to amend her complaint to add as parties in their individual capacities her former supervisor and the former and current departmental directors. Complainant also sought to add the federal EPA. The ARB, applying an abuse of discretion standard, held that the ALJ properly applied 29 C.F.R. § 18.5(e) and reasonably balanced the due process concerns expressed in *Wilson v. Bolin Associates, Inc.*, 1991-STA-4 (Sec'y Dec. 20, 1991), in denying the amendments to the complaint, The ALJ denied addition of the parties because neither of the named persons nor the federal EPA had participated in the proceedings in a very long time. Moreover, the ARB expressly affirmed the ALJ's ruling that the current departmental director would not be able to effect a remedy to Complainant in his or her individual capacity and should not be susceptible to individual liability merely because of succession to the office.

[Nuclear & Environmental Whistleblower Digest XX E]

**STATE SOVEREIGN IMMUNITY INTERVENTION BY ASSISTANT SECRETARY FOR OSHA**

In ***Migliore v. Rhode Island Dept. of Environmental Management***, ARB No. 99-118, ALJ Nos. 1998-SWD-3, 1999-SWD-1 and 2 (ARB July 11, 2003), the Assistant Secretary for OSHA requested that the ARB, following briefing by the parties, decide whether the Assistant Secretary has the authority to intervene to cure a state sovereign immunity bar to a DOL whistleblower suit prior to OSHA making a decision whether to move to intervene for that purpose. The ARB declined, holding that until the Assistant Secretary moves to intervene it does not have a justicable dispute before it. The Board wrote:

> The Board is not bound by the "case or controversy" limitation that applies to the Federal courts, but the policy concerns that militate against the rendering of advisory opinions in Article III courts are also relevant to the question of whether the Board should issue the ruling that the Assistant Secretary requests.

(citations omitted). The ARB, however, granted the Assistant Secretary time to file a motion to intervene.

[Editor's note: This proceeding on intervention by OSHA is related to *Rhode Island v. United States*, 115 F.Supp.2d 269 (D.R.I. 2000) (enjoining adjudication of SWDA whistleblower complainants by DOL under state sovereign immunity) and *Rhode Island Dept. of Envtl. Mgmt v. United States*, 304 F.3d 31 (1st Cir. 2002) (affirming injunction but indicating that the Secretary of Labor could intervene to remove the sovereign immunity bar). The Assistant Secretary subsequently filed a motion to intervene before the ARB. The U.S. District Court for the District of Rhode Island has issued a stay on the briefing schedule before the ARB in order to consider whether to grant the state's motion to enforce the injunction. *Rhode Island Dept. of Envtl. Mgmt v. United States,* No. 00-CV-44 (D.R.I. Oct. 23, 2003).]

[Nuclear & Environmental Whistleblower Digest XX E]
**STATE SOVEREIGN IMMUNITY; *NEVADA V. HIBBS***

In ***Blodgett v. Tennessee Dept. of Environment and Conservation***, 2003-CAA-15 (ALJ Aug. 8, 2003) the ALJ rejected Complainant's assertion that the legislative history of the CAA establishes that Congress intended to abrogate State sovereign immunity to claims filed under the employee protection provision of the CAA under the analysis contained in *Nevada v. Hibbs*, 123 S.Ct. 1972 (2003). The ALJ concluded that Complainant had failed to demonstrate an unequivocal expression of Congressional intent to abrogate state sovereign immunity or that the environmental whistleblower statutes were an exercise of Congressional power under Section 5 of the 14th Amendment.

*To the same effect* ***Powers v. Tennessee Dept. of Environment and Conservation***, 2003-CAA-16 (ALJ July 14, 2003).

# STAA
***Surface Transportation Assistance Act***

[STAA Whistleblower Digest II D 1]
**AMENDMENT OF COMPLAINT; DISCHARGE DURING HEARING; TRIAL OF ISSUE BY CONSENT**

During the hearing in ***Jackson v. Wyatt Transfer, Inc.***, 2000-STA-57 (ALJ Oct. 29, 2003), the parties notified the ALJ that Respondent had discharged Complainant. Complainant alleged that the discharge was in retaliation for protected activity. Considering the seriousness of the employment action, the ALJ broadened the scope of the hearing to include the issue of Complainant's discharge. In his recommended decision, the ALJ noted that despite the lack of notice prior to the administrative hearing, due process is not offended if an agency decides an issue that the parties fully and fairly litigated at the hearing. The ALJ therefore considered the evidence on the discharge, but concluded that Complainant failed to establish his case by a preponderance of the evidence.

[STAA Whistleblower Digest II D 2]
**AMENDMENT OF COMPLAINT; ADDITION OF PARTIES AT TIME OF HEARING**

During the hearing in ***Griffith v. Atlantic Inland Carrier***, 2002-STA-34 (ALJ Oct. 21, 2003), Complainant moved to amend the complaint to add several entities as party-respondents, arguing that they were a family of companies. The ALJ, taking into consideration due process, found that at that late date in the proceedings the rights of the proposed additional party-respondents would be prejudiced if an amendment to the complaint to add party-respondents was permitted.

*See also* ***Howick v. Campbell-Ewald Co.***, 2003-STA-6 (ALJ Aug. 7, 2003) (holding that it is within an ALJ's discretion to permit a complainant to amend his complaint to add individual respondents but finding, *inter alia*, that the motion came so late in the proceeding that it would be manifestly unfair to require the named individual to prepare a defense so close to the date of the hearing).

[STAA Whistleblower Digest II E 4]
**DUE PROCESS; RESPONDENT MUST BE GIVEN NOTICE OF STAA PROVISION WHICH WAS ALLEGEDLY VIOLATED**

Where none of the documents in the record showed a charge of a STAA, 42 U.S.C.A § 31105(a)(1)(B)(i) violation (operation of vehicle in violation of a federal motor vehicle safety regulation), and such a violation was neither raised at the administrative hearing nor tried by express or implied consent, the ARB found that the ALJ's holding that Complainant's refusal to drive was protected under that section was reversible error. ***Ass't Sec'y & Helgren v. Minnesota Corn Processors, Inc.***, ARB No. 01-042, ALJ No. 2000-STA-44 (ARB July 31, 2003) ("Respondents in STAA cases have the right to know the theory on which the agency will proceed.").

*See also* ***Wrobel v. Roadway Express, Inc.***, ARB No. 01-091, ALJ No. 2000-STA-48, slip op. at n.4 (ARB July 31, 2003) (ARB expressing doubt that a section 31104(a)(1)(B)(ii) complaint should be found to have been brought under this provision where it was not stated in the OSHA complaint or pre-hearing statement;

ARB, however, found that determination under this provision by the ALJ was harmless error (if error at all) because, under the facts as found by the ALJ and the ARB, Complainant was not entitled to recovery under this alternative theory).

[STAA Whistleblower Digest II J]
**BRIEFING ON APPEAL IN STAA CASE; SINCE REVIEW IS AUTOMATIC BRIEFS ARE DUE WITHOUT FURTHER ORDER THE BOARD**

In ***Somerson v. Mail Contractors of America***, ARB No. 03-055, ALJ No. 2002-STA-44 (ARB Nov. 25, 2003). the Board ruled:

> Pursuant to 29 C.F.R. § 1978.109, an Administrative Law Judge is required to immediately forward his or her decision under the STAA to the Administrative Review Board (ARB or Board), the Secretary's designee, to issue a final order. The regulation further provides that the parties may file briefs in support of or in opposition to the Administrative Law Judge's decision within thirty days of the date on which the Judge issued the decision. 29 C.F.R. § 1978.109(c)(2). Accordingly, pursuant to 29 C.F.R. § 1978.109, review of the ALJ's R. D. & O. in this case was automatic and any briefs in support of or in opposition to the R. D. & O. were due on January 15, 2003, without further order of the Board.

Slip op. at 5 (footnote omitted).

[STAA Whistleblower Digest II K]
**SUBPOENAS; ERROR TO DENY WITHOUT STATING LEGAL STANDARD OR RATIONALE**

In ***Schwartz v. Young's Commercial Transfer, Inc.***, ARB No. 02-122, ALJ No. 2001-STA-33 (ARB Oct. 31, 2003), the ARB found that the ALJ erred in denying subpoenas to Complainant based on summary conclusions that the requests were untimely, and were "overly broad, vague and not relevant." The ARB faulted the ALJ for failing to cite any pertinent legal standards or otherwise provide a rationale for the rulings. The Board found at least one category of records sought by Complainant to be clearly relevant, and falling squarely within the parameters of materials that are properly discoverable in an employment discrimination case. *See* 29 C.F.R. § 18.14(a)(Scope of discovery; providing that the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding…."). The ARB found that Respondent's concerns about disclosure of dispatch information containing references to other employees could have been effectively addressed through mutual agreement of the parties or a protective order issued by the ALJ. The Board, however, found that the error was harmless because it was able to decide the appeal based on facts not in issue and therefore not impacted by the error in discovery rulings.

In a footnote, the ARB noted the holding in *Bobreski v. U.S. Environmental Protection Agency*, No. 02-0732 (RMU), 2003 WL 22246796 at *6-8 (D.D.C. Sept. 30, 2003), to the effect that an ALJ does not have the authority to issue a subpoena without a specific statutory grant of such authority. The ARB stated "Regardless of whether the

ALJ is authorized to issue subpoenas pursuant to the STAA, he clearly does have the authority to take measures to compel production pursuant to Section 18.6(d) and 18.21."

[STAA Whistleblower Digest II L]
**RESPONDENT REPORTED OUT OF BUSINESS AFTER ALJ ISSUES RECOMMENDED DECISION; ABSENT INFORMATION INDICATING ARB REVIEW IS PRECLUDED, A FINAL DECISION ON THE MERITS WILL STILL ISSUE**

In ***Drew v. Alpine, Inc.***, ARB Nos. 02-044 and 02-079, ALJ No. 2001-STA-47 (ARB June 30, 2003), the ALJ had issued a Recommended Decision and Order recommending that Complainant be reinstated with backpay and that the final Decision and Order be posted at the terminal for 120 days. Respondent, a bus tour company, informed the Board that it did not intend to appeal the ALJ's decision, but indicated that it may need to move to modify the order because Respondent ceased operating bus tours shortly before the ALJ issued his decision. Subsequently, Respondent's attorney withdrew, noting upon information and belief that Respondent's affairs were now subject to a U.S. bankruptcy court proceeding. Bankruptcy notices attached to the attorney's submission, however, did not specially mention Respondent, and the ARB issued an Order to Show Cause. The responses to the Order to Show Cause did not establish that ARB adjudication of the merits would be precluded; accordingly the ARB affirmed and adopted the ALJ's Recommended Decision, but slightly modified the Order to accommodate the uncertainty about whether Respondent was still in business in the surface transportation business.

[STAA Whistleblower Digest II M]
**FALSE STATEMENT BY ATTORNEY TO ARB; POSSIBLE SANCTIONS AND GENERAL LOSS OF CREDIBILITY**

In ***Somerson v. Mail Contractors of America***, ARB No. 03-042, ALJ No. 03-STA-11, slip op. at 4 (ARB Oct. 14, 2003), the ARB struck Complainant's brief where the brief was not timely filed despite several extensions of time and where the brief was filed as an "omnibus" brief which consolidated the briefing for two other cases appealed to the ARB despite the ARB's order denying Complainant's motion for such consolidated briefing. In finding the brief untimely, the ARB found that Complainant's attorney made a patently false statement when he argued that he filed the omnibus brief before receiving a pertinent ARB order because the ARB order was directly referred to in omnibus brief. The ARB admonished the attorney that "[s]uch falsehoods by attorneys appearing before the Board will not be tolerated and may subject the offending attorney to sanctions. Moreover, making such false statements to the Board undermines [Complainant's attorney's] ability to effectively represent his clients because the Board will be reluctant to accept at face value any statement counsel makes that is not confirmed by independent collaborating evidence."

*To the same effect* ***Somerson v. Mail Contractors of America***, ARB No. 03-055, ALJ No. 2002-STA-44 (ARB Nov. 25, 2003).

[STAA Whistleblower Digest II P]
**SUMMARY DECISION; ERROR TO WEIGH CONFLICTING EVIDENCE**

In ruling on a motion for summary decision, the ALJ should set out the standard for summary decision and indicate whether 29 C.F.R. § 18.40(d) is being applied. An ALJ errs if in ruling on a motion for summary decision he weighs the evidence. Rather, the

determination is, viewing the evidence in the light most favorable to the non-moving party, whether genuine issues of material fact exist and whether the moving party is entitled to a summary decision. ***Lee v. Schneider National, Inc.***, ARB No. 02-102, ALJ No. 2002-STA-25 (ARB Aug. 28, 2003).

[STAA Whistleblower Digest IV A 1]
**ANALYTICAL FRAMEWORK; *SHANNON* DECISION**

In ***Leach v. Basin Western Inc.***, ARB No.02-089, ALJ No. 2002-STA-5 (ARB July 31, 2003), the ARB recommended *Shannon v. Consol. Freightways*, ARB No. 98-051, ALJ No. 1996-STA-15, slip op. at 5-7 (ARB Apr. 15, 1998), *aff'd* 181 F.3d 103 (6th Cir. May 14, 1999) (table), for a "concise discussion of the principles relevant to evaluation of conflicting evidence pursuant to the *McDonnell Douglas* paradigm and the dual/mixed motive doctrine in a STAA case."

[STAA Whistleblower Digest IV A 2 a ]
**MOTIVATION; MUST BE RETALIATION TO BE ACTIONABLE, EVEN IF RESPONDENT'S UNDERSTANDING OF THE CIRCUMSTANCES WAS MISTAKEN**

An employer's discharge decision must be motivated by retaliation to be actionable, even if the employer's decision is based on a mistaken conclusion about the circumstances. Thus, evidence presented by Complainant that he suffered a hearing impairment and therefore may not have heard commands made by supervisors was not relevant. ***Clement v. Milwaukee Transport Services, Inc.***, ARB No. 02-025, ALJ No. 2001-STA-6 (ARB Aug. 29, 2003).

[STAA Whistleblower Digest IV A 2 a]
**VIOLATION OF TERM OF SETTLEMENT AGREEMENT; MUST ESTABLISH ALL ELEMENTS OF WHISTLEBLOWER COMPLAINT TO ESTABLISH NEW AND SEPARATE VIOLATION; CAUSATION ESTABLISHED**

In ***Bettner v. Daymark, Inc.***, ARB No. 01-088, ALJ No. 2000-STA-41 (ARB Oct. 31, 2003), the ALJ had found that Respondent's failure to immediately provide full health benefits when the Complainant was reinstated pursuant to the settlement of a prior whistleblower complaint was a de minimus violation (because it related the resolution of Complainant's prior complaint) and that it required no further remedy. The ARB agreed that a violation of a settlement agreement may constitute a new and separate STAA violation, but only where all the elements of a STAA whistleblower complaint are established. In the instant case, Respondent presented credible evidence and testimony to the effect that the delay resulted from Complainant's refusal to complete an enrollment form. Thus, the element of causation was not established. There was no evidence that the delay was motivated by Complainant's protected activity (filing the previous complaint), and therefore no new STAA violation.

[STAA Whistleblower Digest IV A 2 a]
**CAUSATION; COMPLAINANT'S TERMINATION FROM EMPLOYMENT BASED ON INABILITY TO ADJUST TO AN OVERNIGHT SHIFT DOES ESTABLISH RETALIATORY MOTIVE**

In ***Schwartz v. Young's Commercial Transfer, Inc.***, ARB No. 02-122, ALJ No. 2001-STA-33 (ARB Oct. 31, 2003), Respondent supplied commercial trucking services for freshly harvested tomatoes during a three-month harvest season. Respondent's 12-hour shift schedule on successive work days did not violate applicable federal and

state law, which provided exceptions for the type of agricultural transport operations at issue in the case. Complainant was aware of the 12 hour shift, but had difficulty adjusting to the night schedule he had been assigned (6:00 pm to 6:00 am) because of fatigue. Respondent terminated Complainant's employment after seven scheduled nights because it had become clear that Complainant was not going to be able "to get the job done" for Respondent. The ARB found that the evidence established that Complainant "failed to demonstrate that he was prepared to take on the rigors of performing, on a continuing basis, the 12-hour overnight shifts required by the … job. We therefore conclude that [Complainant] has failed to establish by a preponderance of the evidence that [Respondent] terminated his employment in retaliation for engaging in protected activity." Slip op. at 10 (citations omitted).

[STAA Whistleblower Digest IV A 2 a]
**INFERENCE OF CAUSATION; COMPLAINANT MUST STILL ESTABLISH BY PREPONDERANCE OF THE EVIDENCE**

In ***Coppola v. Quality Associates, Inc.***, ARB No. 02-114, ALJ No. 2002-STA-13 (ARB Aug. 29, 2003), the ALJ found that the evidence was sufficient to raise an inference of a causal nexus between the protected activity and the termination decision. The ARB observed that this ruling left it unclear whether Complainant carried his ultimate burden to establish – by a preponderance of the relevant evidence – that Complainant's protected activity played a role in the termination decision. The ARB, however, found that any error in the ALJ's analysis was harmless because of his finding, which the ARB affirmed, that Respondent would have fired Complainant because of speeding and performance problems even in the absence of his protected activity.

[STAA Whistleblower Digest IV A 2 b ii]
**CAUSATION; TEMPORAL PROXIMITY NOT ESTABLISHED**

In ***Simpkins v. Rondy Co., Inc.***, ARB No. 02-097, ALJ No. 2001-STA-59 (ARB Sept. 24, 2003), the ARB affirmed the ALJ's finding that Complainant had not established a causal link between the protected activity and the adverse employment action where Complainant's protected activity was remote to warning letters and the ultimate termination, whereas the warning letters and termination closely followed incidents that Respondent believed were a deviation from company policy. There was also a lack of evidence indicating that Respondent's management held hostility against Complainant for STAA-protected activity.

[STAA Whistleblower Digest IV A 2 d]
**REFUSAL TO WORK; MERE NOTIFICATION TO DISPATCHER OF ILLNESS DOES NOT CONSTITUTE NOTICE OF PROTECTED ACTIVITY**

The mere facts that Complainant notified the dispatcher that he was sick, without any further elaboration, and that he presented a vague note from his chiropractor upon his return to work which made no mention of any condition which made it unsafe for Complainant to drive are insufficient to show that Respondent had knowledge of Complainant's protected activity (refusal to drive because illness or fatigue made it unsafe for him to begin or continue to operate a commercial motor vehicle) and thus do not support a STAA whistleblower complaint. ***Wrobel v. Roadway Express, Inc.***, ARB No. 01-091, ALJ No. 2000-STA-48 (ARB July 31, 2003).

[STAA Whistleblower Digest IV B 2 c]
**LEGITIMATE, NON-DISCRIMINATORY REASON; INSUBORDINATION**

Even if an employee engages in protected activity, an employer may discipline the employee for insubordination. ***Clement v. Milwaukee Transport Services, Inc.***, ARB No. 02-025, ALJ No. 2001-STA-6 (ARB Aug. 29, 2003). In ***Clement***, although Complainant was being approached about his use of flashers (Complainant alleged that federal law required use of the flashers whenever he stopped in traffic, whereas Respondent's policy was to use them only in emergencies) the record established that his discharge was for ignoring a supervisor and for his refusal to attend a meeting.

[STAA Whistleblower Digest IV B 2 e]
**LEGITIMATE NON-DISCRIMINATORY REASON FOR DISCHARGE; INABILITY TO PERFORM THE PHYSICAL DEMANDS OF THE JOB**

Where a complainant is terminated from employment because of physical inability to perform assigned duties, there is no violation of the STAA whistleblower provision. ***Sosnoskie v. Emery, Inc.***, ARB No. 02-010, ALJ No. 2002-STA-21 (ARB Aug. 28, 2003). In ***Sosnoskie*** Complainant returned to long haul truck driving following a disabling back injury several years earlier. On his first trip, he was unable to complete the return trip because of a sore back and fatigue. Respondent thereafter terminated Complainant's employment based in inability to perform physical demands of the job. Respondent had not required Complainant to drive in excess of 10 hours or while fatigued.

[STAA Whistleblower Digest IV B 4]
**UTILITY OF PRIMA FACIE CASE ANALYSIS AFTER CASE HAS BEEN FULLY TRIED ON THE MERITS**

The ARB discourages the unnecessary discussion of whether a whistleblower has established a *prima facie* case when the case has been fully tried. ***Schwartz v. Young's Commercial Transfer, Inc.***, ARB No. 02-122, ALJ No. 2001-STA-33, slip op. at n.9 (ARB Oct. 31, 2003).

To the same effect: ***Chapman v. Heartland Express of Iowa***, ARB No. 02-030, ALJ No. 2001-STA-35 (ARB Aug. 28, 2003) (as reissued under Sept. 9, 2003 errata); ***Waters v. Exel North American Road Transport***, ARB No. 02-083, ALJ No. 2002-STA-3 (ARB Aug. 26, 2003); ***Leach v. Basin Western Inc.***, ARB No.02-089, ALJ No. 2002-STA-5 (ARB July 31, 2003); ***Simpkins v. Rondy Co., Inc.***, ARB No. 02-097, ALJ No. 2001-STA-59 (ARB Sept. 24, 2003).

[STAA Whistleblower Digest V A 3]
**PROTECTED ACTIVITY; PROTECTION NOT LIMITED TO FEDERAL LAWS, BUT NONETHELESS MUST RELATE TO SPECIFIC REGULATION, STANDARD OR ORDER**

The STAA whistleblower provision protection extends beyond just complaints relating to federal motor vehicle safety regulations, but any relevant motor vehicle regulation, standard or order. ***Chapman v. Heartland Express of Iowa***, ARB No. 02-030, ALJ No. 2001-STA-35 (ARB Aug. 28, 2003) (as reissued under Sept. 9, 2003 errata) (general complaints about fatigue were not protected as they did not relate to a violation of any particular motor vehicle regulation, standard or order).

[STAA Whistleblower Digest V B 2 a iii]
**REASONABLE APPREHENSION CLAUSE; CORRECTION OF UNSAFE CONDITION IN NOTIFICATION OF ILLNESS CASE**

In ***Wrobel v. Roadway Express, Inc.***, ARB No. 01-091, ALJ No. 2000-STA-48 (ARB July 31, 2003), the ARB clarified how the "correction of the unsafe condition" requirement of the reasonable apprehension provision of section 31105(a)(1)(B)(ii) applies in a case involving refusal to drive based on an assertion of illness. The Board wrote: "[t]he reasonable apprehension provision expressly requires that the employee had 'sought from the employer, and been unable to obtain correction of the unsafe condition.' 49 U.S.C.A. § 31105(a)(2). Thus, in order to show that he had sought and been unable to obtain correction of the unsafe condition, Wrobel would have had to provide Roadway with adequate information that it was unsafe for him to drive. The mere assertion that he was 'sick,' particularly under the circumstances presented [evidence casting significant doubt on the credibility of the assertion that he was sick], was inadequate to do so." Slip op. at n.4.

[STAA Whistleblower Digest V B 2 b]
**PROTECTED ACTIVITY; DOT REGULATIONS UNDER § 3105(a)(1)(B)(ii)**

DOT regulations governing transportation of hazardous loads at 49 C.F.R. § 397.17 do not require inspection of tires on non-placard loads every two hours or 100 miles (whereas they do on placarded loads). Thus, an STAA Complainant who routinely performed such inspections on non-placard loads was not engaged in protected activity for purposes of 49 USCA § 3105(a)(1)(B)(i). Similarly, the ARB found that Complainant's claim that such inspections were supported by DOT regulations at 49 C.F.R. § 392.7, 396.1 and 396.13, which are general instructions on inspections and driver satisfaction on good working order of the vehicle, could not be interpreted as requiring two hour/100 mile tire inspections absent FHA/DOT guidance so mandating. ***Monde v. Roadway Express, Inc.***, ARB No. 02-071, ALJ Nos. 2001-STA-22 and 29 (ARB Oct. 31, 2003).

[STAA Whistleblower Digest V A 4]
**PROTECTED ACTIVITY; REASONABLENESS OF COMPLAINANT'S TIRE INSPECTION PRACTICES; CREDIBILITY OF WITNESSES**

DOT regulations governing transportation of hazardous loads at 49 C.F.R. § 397.17 do not require inspection of tires on non-placard loads every two hours or 100 miles (whereas they do on placarded loads). Considering whether Complainant's routine practice of performing such inspections was nonetheless protected activity for purposes of 49 USCA § 3105(a)(1)(B)(ii) (the "reasonable apprehension" provision), the ARB found that substantial evidence supported the ALJ's conclusion that, absent a suspicion of a problem, Complainant's apprehension of tire failure was not reasonable. The ALJ's findings were largely based on credibility findings on the testimony of various witnesses. ***Monde v. Roadway Express, Inc.***, ARB No. 02-071, ALJ Nos. 2001-STA-22 and 29 (ARB Oct. 31, 2003).

[STAA Whistleblower Digest VI B 4]
**ADVERSE ACTION; REQUIRING DRIVERS TO LOG LAYOVER TIME AS "OFF-DUTY" WAS NOT IMPROPER WHERE DRIVER WAS NOT CONFINED TO MOTEL**

Where credible testimony indicated that Respondent had specific methods for maintaining contact with dispatch while leaving hotels at foreign domiciles, the ARB found that Respondent did not violate 49 C.F.R. § 395.8(f)(7) by directing Complainant to log compensated layover time as "off-duty." Complainant had maintained that he was confined to his hotel room during such layovers. According to a witness sympathetic to Complainant on this issue, remaining in readiness in a motel room with nowhere to go could promote a "fatigue situation." ***Monde v. Roadway Express, Inc.***, ARB No. 02-071, ALJ Nos. 2001-STA-22 and 29 (ARB Oct. 31, 2003).

[STAA Whistleblower Digest VI B 4]
**RESIGNATION; EMPLOYER NOT OBLIGED TO RESCIND OR REHIRE**

Where a complainant is understood by the employer to have resigned, it has no obligation to rescind that resignation, or to rehire the complainant when it was dissatisfied with his conduct or previous work record. ***Bettner v. Daymark, Inc.***, ARB No. 01-088, ALJ No. 2000-STA-41 (ARB Oct. 31, 2003).

[STAA Whistleblower Digest VI B 4]
**ADVERSE EMPLOYMENT ACTION; RESPONDENTS' FILING OF MOTION FOR PROTECTIVE ORDER**

In ***Somerson v. Mail Contractors of America***, ARB No. 03-042, ALJ No. 2003-STA-11 (ARB Oct. 14, 2003), Complainant alleged that Respondents' filing of a request for a protective order and witness interview restriction in a prior case constituted a violation of STAA whistleblower law. The ALJ found the complaint to be completely specious and granted summary dismissal of the matter. *See Somerson v. Mail Contractors of America*, 2003-STA-11 (ALJ Jan. 10, 2003). On reviewing the facts in the light most favorable to Complainant, the ARB agreed with the ALJ that Complainant had "failed to rebut the Respondents' motion to dismiss with a demonstration of a dispute in material fact and that he has failed to allege and to adduce evidence in support of an essential element of his complaint, i.e., that the filing of the request for a protective order constituted 'discipline or discriminat[ion] against an employee regarding pay, terms, or privileges of employment.'"

The motion for protective order asserted that Complainant had transmitted anonymous, implicitly threatening, e-mails to persons named as witnesses in the prior proceeding and established anonymous websites directed at its counsel which contain vulgar, abusive and implicitly threatening messages. The motion sought a protective order against the abusive e-mails and websites, and requested restrictions on Somerson's contact with prospective witnesses. *See Somerson v. Mail Contractors of America, Inc.*, 2002-STA-44 (ALJ Dec. 16, 2002) (ALJ ultimately dismissed case based on Complainant's misconduct). The ARB noted that the ALJ in the instant proceeding had found Complainant's attorney's pursuit of the instant complaint was intimidation and harassment under the guise of representing a client, and reported the attorney's actions to the appropriate board of professional responsibility.

[STAA Whistleblower Digest VI B 4]

**ADVERSE EMPLOYMENT ACTION; RESPONDENT DID NOT SUBJECT COMPLAINANT TO ADVERSE ACTION WHERE HE WALKED AWAY FROM A MEETING AND NEVER RETURNED FOR DISPATCH**

Where Complainant walked away from a meeting with management officials (about Complainant's verbal confrontation with an operations agent) without giving a requested assurance that he would not engage in further threatening behavior and without thereafter returning to work, the ARB affirmed the ALJ's finding that Respondent had not engaged in an adverse action, as Complainant chose not to be dispatched by not reporting to work. The record established that Respondent's policy was not to contact contractors for dispatch. ***Waters v. Exel North American Road Transport***, 2002-STA-3 (ALJ June 4, 2002).

[STAA Whistleblower Digest VII B 5 c]

**PARTY; WHETHER LAWYER AND LAW FIRM REPRESENTING A RESPONDENT MAY BE A "PERSON" WHO MAY BE SUED UNDER STAA WHISTLEBLOWER PROVISION**

In ***Somerson v. Mail Contractors of America***, ARB No. 03-042, ALJ No. 2003-STA-11 (ARB Oct. 14, 2003), Complainant alleged that the filing of a request for a protective order and witness interview restriction in a prior case constituted a violation of STAA whistleblower law, naming Employer's attorney and his law firm as respondents. The ALJ recommended dismissal of the complaint in regard to the attorney and law firm on the ground, *inter alia*, that they were not employers as defined by 49 U.S.C.A. § 31101(3)(A). The ARB wrote:

> Thus, the ALJ's dismissal of the complaint against MCOA's legal representatives was based initially on his determination that a "person" under 49 U.S.C.A. § 31105(a) must be an "employer" under 49 U.S.C.A. § 31101(3)(A). However, a "person" is defined under the STAA's interpretive regulations as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons." 29 C.F.R. § 1978.101(i). Thus the definition of "person" does not exclusively restrict its coverage to "employers," and in fact, specifically includes "legal representatives." It is indisputable that the provision includes employers and that in most cases a "person," who is in the position to discharge, discipline or discriminate against an employee, will be an employer.

The ARB, however, declined to decide this issue, as it disposed of the case on other grounds. *See also* ***Somerson v. Mail Contractors of America***, ARB No. 03-042, ALJ No. 2003-STA-11 (ARB Dec. 16, 2003) (Order Denying Complainant's Motion to Vacate, strongly reinforcing that the ARB had not determined this issue in the Oct. 14, 2003 decision).

[STAA Whistleblower Digest IX C]
**ATTORNEY'S FEES AND COSTS TO RESPONDENT; DOL DOES NOT HAVE THE AUTHORITY TO AWARD UNDER THE STAA**

In ***Somerson v. Mail Contractors of America***, ARB No. 03-042, ALJ No. 2003-STA-11 (ARB Oct. 14, 2003), the ARB denied Respondents' request that the Board enter an award of costs and attorneys' fees against Complainant, noting that the Secretary of Labor had held that there is no authority to award attorney's fees and costs against a complainant under the STAA. *Abrams v. Roadway Express, Inc.,* 1984-STA -2, slip op. at 1-2 (May 23, 1985). In the decision, the ARB had affirmed the ALJ's summary denial of a "specious" complaint.

To the same effect: ***Somerson v. Mail Contractors of America***, ARB No. 02-057, ALJ Nos. 2002-STA-18 and 19, slip op. at n.50 (ARB Nov. 25, 2003).

[STAA Whistleblower Digest IX C]
**ATTORNEYS FEES AND COSTS; REDUCTION IN PROPORTION TO LIMITED SUCCESS OF COMPLAINT**

In ***Eash v. Roadway Express, Inc.***, ARB Nos. 02-008 and 02-064, ALJ No. 2000-STA-47 (ARB June 27, 2003), the ARB affirmed the ALJ's reduction of attorney's fees and costs based on the limited degree of success of Complainant's attorney in presenting the case. Specifically, the ALJ had granted partial summary decision to Respondent on three issues in June of 2001; the ALJ reduced attorney's fees by one-half for work prior to that time as one-half of the case was dismissed on summary decision. Three issues remained after the summary decision, with Complainant ultimately prevailing on only one issue. The ALJ therefore ordered that Complainant's attorney only receive one-third of all fees charged after June of 2001. The ARB also affirmed the ALJ's reduction in the same proportions of Complainant's costs. Complainant's only relief in the matter had been expungement of a single warning letter. Respondent was ordered to pay a total of $17,774.25 in attorney's fees and costs.

[STAA Whistleblower Digest XI B 1]
**DISMISSAL FOR CAUSE; ABANDONMENT**

Where the facts dictate that a party has failed to prosecute his or her case, the ARB will affirm an ALJ's recommended decision and order on grounds of abandonment. ***Ass't Sec'y & Reichelderfer v. Bridge Transport, Inc.***, ARB No. 02-068, ALJ No. 2001-STA-40 (ARB Aug. 29, 2003) (parties' requested a settlement judge, but Respondent discharged its counsel prior to appointment of a settlement judge and did not respond to further contacts by the ALJ and ARB); ***LaRue v. KLLM Transport Inc.***, ARB No. 02-024, ALJ No. 2001-STA-54 (ARB July 22, 2003) (Complainant failed to attend scheduled hearing and did not respond to ALJ's subsequent order to show cause); ***Dickson v. Lakefront Lines, Inc.***, ARB No. 02-029, ALJ No. 2001-STA-62 (ARB July 24, 2003) (Complainant refused service of ALJ order granting a continuance and on three occasions refused to accept service of motions filed by Respondent); ***Dickson v. Butler Motor Transit/Coach USA***, ARB No. 02-098, ALJ No. 2001-STA-39 (ARB July 25, 2003) (Complainant failed to comply with ALJ's discovery orders).

[STAA Whistleblower Digest XI B 2]
**DISMISSAL FOR CAUSE; FAILURE TO COMPLY WITH DISCOVERY ORDERS**

Where Complainant was afforded ample opportunity to comply with the ALJ's orders to compel discovery and Complainant was given clear and unambiguous notice that a decision in the proceeding could be rendered against him for failure to respond to the ALJ's orders, the ALJ's recommendation to dismiss under 29 C.F.R. § 18.6(d)(2) was affirmed by the ARB. ***Dickson v. Butler Motor Transit/Coach USA***, ARB No. 02-098, ALJ No. 2001-STA-39 (ARB July 25, 2003).

[STAA Whistleblower Digest XI B 3]
**MISCONDUCT OF COMPLAINANT DURING HEARING; INHERENT AUTHORITY OF ALJ TO DISMISS COMPLAINT FOR EGREGIOUS BEHAVIOR**

In ***Somerson v. Mail Contractors of America***, ARB No. 02-057, ALJ Nos. 2002-STA-18 and 19 (ARB Nov. 25, 2003), the ARB affirmed the ALJ's dismissal of the complaint based on Complainant's misconduct before, during and after the hearing. Although the ALJ concluded that he had authority to dismiss the complaint for misconduct pursuant to the OALJ Rules of Practice and Procedure at 29 C.F.R. §§ 18.6(d) and 18.36, the ARB concluded that neither of those rules authorize such a dismissal. The ARB found that section 18.36 would authorize exclusion of a party for misconduct, but does not authorize dismissal of the complaint. The Board found that although section 18.36(d)(2)(v) permits an ALJ to render a decision against a party who fails to comply with an order, that section only refers to orders issued concerning discovery, and not to orders or warnings the ALJ gives to a party disobeying pre-trial orders or misbehaving at a hearing. Nonetheless, the ARB held that DOL ALJs "have inherent power to dismiss whistleblower complaints when they find that the complainant's conduct is egregious." The ARB cautioned, however:

> But an ALJ must exercise inherent power discreetly, being careful to "fashion an appropriate sanction for conduct which abuses the judicial process."
>
> In determining the appropriate sanction, the ALJ should "carefully balance the policy favoring adjudication on the merits with competing policies such as the need to maintain institutional integrity and the desirability of deterring future misconduct." Therefore, since dismissal is perhaps the severest sanction and because it sounds "'the death knell of the lawsuit,' [the ALJ] must reserve such strong medicine for instances where . . . misconduct is correspondingly egregious."

Slip op. at 9 (footnotes omitted). In the case at bar, the ARB found that Complainant's insolent responses to the ALJ's pre-hearing orders, his flagrant disdain, mocking behavior and accusations at the hearing, and other conduct, constituted "blatantly contumacious, egregious misconduct that threatened the integrity of the judicial process." The ALJ had warned Complainant four times that further misconduct could result in dismissal of his complaints, illustrating that the ALJ's patient attempts to adjudicate the case had become futile. Therefore, the ARB affirmed the ALJ's dismissal of the complaints. In a footnote, the ARB observed that the audiotape of the

hearing was more fully illustrative of Complainant's behavior than what the transcript alone revealed.

To the same effect in regard to the ruling on the inherent authority of an ALJ to fashion sanctions for misconduct, see ***Somerson v. Mail Contractors of America***, ARB No. 03-055, ALJ No. 2002-STA-44 (ARB Nov. 25, 2003).

[Editor's note: The ARB's ruling that section 18.6(d)(2)(v) only applies to discovery orders is significant for all program areas adjudicated by OALJ, as ALJs have commonly relied on this provision as authority for potential sanctions for non-compliance with all kinds of lawful orders. The ARB decision preserves the ALJ's authority to impose the severe sanction of dismissal, but ALJs will now need to cite their inherent authority to control hearings rather than cite to this Rule of Practice, except in regard to refusals to comply with discovery orders.

*But see* ***Dickson v. Lakefront Lines, Inc.***, ARB No. 02-029, ALJ No. 2001-STA-62 (ARB July 24, 2003) (indicating that section 18.6(d)(2) provides support for dismissal of a case based on abandonment; Complainant had refused service of ALJ order granting a continuance and three motions filed by Respondent; ALJ had also based dismissal on Complainant's lack of cooperation on discovery but ARB ruling appears to have been based on refusal of service)]

[STAA Whistleblower Digest XI B 3]
**DISMISSAL FOR CAUSE; MISCONDUCT OF COMPLAINANT DURING HEARING; THREATENING AND INTIMIDATING WITNESSES**

In ***Somerson v. Mail Contractors of America***, ARB No. 03-055, ALJ No. 2002-STA-44 (ARB Nov. 25, 2003), Complainant had sent harassing and implicitly threatening e-mails and opened anonymous web sites directed at Employer and its counsel, despite being subject to a Consent Order entered into before a federal district court requiring him to conduct himself within the bounds of appropriate respect and decorum in litigating cases before OALJ (based on his conduct in a prior whistleblower proceeding). The Board found that Complainant's response to an order to show cause evidenced "no recognition of the severity of his misconduct or intention to renounce his campaign of harassment and intimidation" and therefore supported the ALJ's decision to dismiss the case, especially in view of the consent order.

[STAA Whistleblower Digest XI B 3]
**DISMISSAL FOR CAUSE; PATTERN OF DELAY AND MALFEASANCE BEFORE ALJ**

In ***Howick v. Campbell-Ewald Co.***, 2003-STA-6 (ALJ Sept. 18, 2003), the ALJ dismissed the complaint based on a pattern of delay and malfeasance by Complainant and his counsel. The ALJ recounted Complainant's lengthy delay in making himself available for deposition and in answering interrogatories and requests for production of documents. In addition, the ALJ recounted Complainant's attorney's repeated violations of orders, including filing frivolous motions, filing letters instead of motions, making a late request for subpoenas, and failure to be prepared at the start of the hearing with marked, indexed and timely exchanged documents. The ALJ also noted that he had repeatedly warned Complainant that he was dangerously close to having his complaint dismissed. The ALJ emphasized that no one action or inaction by Complainant or his counsel precipitated the dismissal, but rather the totality of the circumstances. The ALJ found that Complainant's stalling in the taking of his deposition essentially precluded Respondent from pursuing any discoverable evidence

that arose out of the deposition "most notably the recordings of conversations and voicemail messages that Complainant made but did not produce." USDOL/OALJ Reporter @ 26 [HTML].

**ATTORNEY-CLIENT PRIVILEGE; BURDEN ON PROPONENT TO DEMONSTRATE ITS APPLICABILITY**

In ***Welch v. Cardinal Bankshares Corp.***, 2003-SOX-15 (ALJ Aug. 1, 2003), Complainant asked that Respondent be required to produce for the ALJ's *in camera* inspection minutes of joint meetings of several Audit Committees, asserting that nearly fifty percent of the text of the minutes produced by Respondent during discovery were redacted based on Respondent's assertion of the attorney-client privilege. Respondent had merely inserted "redacted-attorney client privilege" in the blank portions of the documents. The ALJ wrote:

> The Fourth Circuit, in whose jurisdiction this case arises, has adopted the "classic test" for determining the existence of the attorney-client privilege:
>
> > "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client."
>
> *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir.1982) (quoting *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D.Mass.1950)). "The burden is on the proponent of the attorney-client privilege to demonstrate its applicability." *Jones*, 696 F.2d at 1072.
>
> The insertion of "redacted-attorney client privilege" in the omitted portions of the Audit Committee meeting minutes is inadequate to meet Respondent's burden to demonstrate that the attorney-client privilege is applicable to the communications at issue. Respondent shall therefore submit to me for *in camera* inspection copies of the unredacted minutes of these meetings. Respondent

> shall also file with these documents such additional documentation and argument as is necessary to allow me to make an informed determination with respect to whether the privilege applies.

Thereafter, in ***Welch v. Cardinal Bankshares Corp.***, 2003-SOX-15 (ALJ Aug. 15, 2003), the ALJ determined after *in camera* review that the privilege was not properly invoked because the communications in question did not include *confidential client communications*. Although two of Respondent's attorneys made statements before the Audit Committees, none of those statements contained confidential client communications made by Respondent. Rather, "the statements made by [the attorneys], in large part, consist of their descriptions of verbal and written communications *made by or to Complainant*, and actions *taken by him*, with respect to his concerns about alleged improprieties at the bank." Slip op. at 4 (italics as in original). The ALJ cited the applicable law, to wit:

> According to the U.S. Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises: "Because the privilege protects the substance of communications, it may also be extended to protect communications by the lawyer to his client, agents, or superiors or to other lawyers in the case of joint representation, *if those communications reveal confidential client communications*." *U.S. v. [Under Seal]*, 748 F.2d 871, 874 (4th Cir. 1984) (italics added). The D.C. Circuit has adopted a similar rule. Relying on its decision in *Mead Data Cent., Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 254 (D.C.Cir.1977), that court wrote: "[W]hen the attorney communicates to the client, the privilege applies [to the attorney's statements] only if the communication 'is based on confidential information provided by the client.'" *Brinton v. Department of State*, 636 F.2d 603, 603 (D.C. Cir. 1980).

The ALJ also ruled that disclosure of these communications regarding Complainant to a third party entity with which Respondent was then attempting to merge had not been established by Respondent not to constitute a waiver of the privilege if it existed.

Finally, the ALJ discussed whether Complainant, as Vice President and Chief Financial Officer of Respondent at the time of the pertinent meetings, was entitled to waive attorney-client privilege if it existed. The ALJ stated that arguably he was so entitled, but declined to decide this issue because the disclosures did not involve confidential client communications and because, even if they did, disclosures made to a third party waived the privilege.

**HEARING REQUEST; FAILURE TO SERVE RESPONDENT SUBJECT TO EQUITABLE TOLLING**

In ***Lerbs v. Buca Di Beppo, Inc.***, 2004-SOX-8 (ALJ Dec. 30, 2003), Complainant timely filed a request for an ALJ hearing but did not serve Respondent. The ALJ's office faxed a copy of hearing request to Respondent several days after the case was assigned to the presiding ALJ. Thereafter, Respondent filed a motion to dismiss based

on Complainant's failure to serve on it a copy of the objections to the OSHA findings and request for formal hearing.

Noting that the question appeared to be one of first impression under the SOX whistleblower regulations, the ALJ found that the applicable SOX regulations were non-jurisdictional and therefore subject to equitable considerations. The ALJ found that the OSHA determination letter had not instructed Complainant that he was required to simultaneously serve a copy of his objections on the other parties of record. Thus, the ALJ found the instant case was analogous to *Spearman v. Roadway Express, Inc.*, 1992-STA-1 (Sec'y Aug. 5, 1992), in which the Secretary had allowed equitable tolling under the STAA whistleblower regulations where the complainant had promptly filed a request for review with the appropriate agencies but failed to serve it on his employer due to a confusing and misleading notice from OSHA. The ALJ also noted similarity to *Gates v. Georgia-Pacific Corp*., 492 F.2d 292 (9th Cir. 1974) and *Swint v. Net Jets Aviation, Inc.*, 2003-AIR-26 (ALJ July 9, 2003) (ALJ observed that AIR21 regulations were used for SOX cases until SOX regulations were published, therefore making *Swint* authority with persuasive value). Finally, the ALJ found that there was no evidence that delayed receipt of the hearing request hampered Respondent's ability to develop evidence or otherwise proceed with the litigation.

**MOTION IN LIMINE; EXPERT OPINION OF LAW PROFESSOR ON LEGAL ETHICS ISSUE**

In ***Welch v. Cardinal Bankshares Corp.***, 2003-SOX-15 (ALJ Aug. 15, 2003), Complainant had listed as a witness a law professor with qualifications as an expert in legal ethics and professional responsibility in regard to Respondent's assertion that allowing Complainant's personal attorney to attend during meetings of Respondent's Audit Committees would have abrogated the attorney-client privilege by Respondent and its attorneys. Respondent filed a motion objecting to the witness' qualifications as an expert, which the ALJ construed as a motion *in limine*, arguing that the law professor's testimony was excludable because it would amount to "an expert opinion on a legal issue" which the ALJ must decide. The ALJ, however, concluded that the law professor's expert opinion would relate to an issue of fact – the reasonableness of Respondent's assertion regarding the abrogation of the attorney-client privilege in Audit Committee meetings – rather the issue of law of whether there would have been an abrogation. The ALJ also observed that formal rules of evidence did not apply to SOX proceedings and that the specialized knowledge of an expert in legal ethics and professional responsibility would clearly assist him in deciding, if required to do so, whether Respondent reasonably believed that the presence of Complainant's personal attorney would negate attorney-client privilege.

**PETITION FOR REVIEW; DECLINATION OF REVIEW BY ARB; ALJ'S DECISION BECOMES FINAL DECISION OF THE SECRETARY**

In ***Walker v. Aramark Corp.***, ARB No. 04-006, ALJ No. 2003-SOX-22 (ARB Nov. 13, 2003), Complainant timely filed a petition for review of the ALJ's Decision and Order with the ARB. Noting that pursuant to 29 C.F.R. § 1980.110(b) the ALJ's decision becomes the final decision of the Secretary unless the ARB issues an order accepting the case for review, and that the ARB had not issued such an order, the ARB issued an order closing the case.

**RESPONDENT; NO LIABILITY IF NOT A COMPANY WITH A CLASS OF SECURITIES REGISTERED UNDER SECTION 12 OR IF NOT REQUIRED TO FILE REPORTS UNDER SECTION 15(d)**

In ***Flake v. New World Pasta Co.***, 2003-SOX-18 (ALJ July 7, 2003), the ALJ granted summary judgment to Respondent where it established that it was not a company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. section 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. section 78o(d), thereby subjecting it to jurisdiction under Section 806 of the Sarbanes Oxley Act, 18 U.S.C. section 1514A(a).

In 1999, Respondent had filed a registration statement with the SEC as a result of a public offering of indentures; however, the ALJ found that thereafter Respondent's registration obligation was automatically suspended by virtue of the plain language of 15 U.S.C. section 15(d). In making this determination, the ALJ found that the absence of a regulation on this point was not of relevance in view of the plain language of the statute itself. Moreover, automatic suspension was supported by both a publication issued by the Chief Counsel for the SEC Division of Corporate Finance "Manual of Publicly Available Telephone Interpretations" and that Division's "Frequently Asked Questions" publication.

Subsequently, respondent had filed some of the reports required by section 15(d) pursuant to its indenture agreement with its lenders; however, the ALJ found that such a contractual arrangement did not make Respondent an issuer required to file reports under section 15(d) – rather in order for SOX whistleblower liability to attach the company must be required by the SEA to make such filings.

**UNTIMELY FILING OF COMPLAINT; EQUITABLE ESTOPPEL; SEVERANCE AGREEMENT; MUST SHOW THAT COMPLAINANT WAS LULLED INTO INACTION**

In ***Moldauer v. Canandaigua Wine Co.***, 2003-SOX-26 (ALJ Nov. 14, 2003), Complainant alleged that he was entitled to equitable estoppel to excuse an untimely filing of a SOX whistleblower complaint based on his signature of a severance agreement in which he agreed to release any discrimination claims he might have under federal and state law against Respondent in exchange for his severance package. The ALJ found the issue to be whether Respondent entered the severance agreement in order to prevent Complainant from asserting his rights under the Act. The ALJ found that equitable estoppel did not apply, writing:

> Most importantly, the doctrine of equitable estoppel requires that the complainant reasonably rely on the respondent's conduct. *Santa Monica*, 202 F.3d at 1177. Despite the severance agreement, Mr. Moldauer filed a complaint with [the California Department of Fair Employment and Housing], met with the FBI to discuss Respondent's alleged accounting improprieties, and complained to the SEC about Respondent's accounting practices within one month of signing the severance agreement. Collectively, these actions indicate that Mr. Moldauer was not lulled into inaction by the severance agreement.

**UNTIMELY COMPLAINT; EQUITABLE TOLLING; DEPARTURE FROM COUNTRY; WRONG FORUM; IGNORANCE OF THE LAW**

In ***Moldauer v. Canandaigua Wine Co.***, 2003-SOX-26 (ALJ Nov. 14, 2003), Complainant alleged that he was entitled to equitable tolling to excuse an untimely filing of a SOX whistleblower complaint based on three grounds: (1) he was unable to conduct his affairs after he was terminated because he had to leave the United States, (2) he raised this claim with incorrect agencies within the statutory period, and (3) neither Complainant nor the attorney he retained in conjunction with the severance agreement were aware of the Act's whistleblower protection provisions. The ALJ observed that "[e]quitable tolling may be appropriate when the complainant demonstrates that extraordinary circumstances prevented him from 'managing his affairs and thus from understanding his legal rights and acting upon them.' *Hall v. EG&G Defense Materials, Inc.*, ARB Case No. 98-076 (ARB Sept. 30, 1998)." The ALJ observed that Complainant had an experienced attorney, that he registered complaints with a state agency, the FBI and the SEC prior to leaving the country, and that his departure was apparently voluntary – and therefore found that he was not entitled to equitable tolling on this ground. Equitable tolling for filing in the wrong forum was not warranted because the complaint Complainant filed with the state agency – although referencing "whistleblowing" – did not implicate activities covered by the Sarbanes-Oxley Act whistleblower provision, and because Complainant failed to produce a copy of the complaint he filed with the SEC. Moreover, because he was represented by an attorney Complainant is deemed to have had constructive notice of the SOX whistleblower complaint procedure and the agency with which such a complaint should have been filed. Finally, the ALJ found that lack of awareness that SOX contained a whistleblower provision did not warrant equitable tolling because a Complainant who has retained counsel is deemed to have had constructive notice of appropriate legal remedies and, even for unrepresented claimants there is no authority for tolling a statute of limitations based on ignorance of the law.

# PSI

***Pipeline Safety Improvement Act of 2002***

## RETROACTIVE APPLICATION

In ***Saban v. Morrison Knudsen***, 2003-PSI-1 (ALJ July 25, 2003), the ALJ found that the statutory language and Congressional history of section 60129 of the Pipeline Safety Improvement Act evidenced no intent by Congress for retroactive application. Accordingly, where Complainant's complaint was about circumstances that occurred in 1999 but the PSI whistleblower provision did not become effective until December 17, 2002, the ALJ granted Respondent's motion to dismiss.

# MISCELLANEOUS

### DISCOVERY; ELECTRONIC RECORDS; E-MAIL

Judge Shira A. Scheindlin of the U.S. District for the Southern District of New York issued a series of rulings in 2003 involving discovery of electronic records and e-mail in ***Zubulake v. UBS Warburg LLC***, No. 02 Civ 1243. The Plaintiff's suit is grounded in Federal, State and City law for gender discrimination and illegal retaliation. Discovery in the case has focused on Plaintiff's contention that key evidence is located in various e-mails that now exist only on backup tapes and possibly on other archived media. Although practice under the FRCP may differ in significant respects from practice under USDOL rules, Judge Scheindlin rulings in the ***Zubulake*** case provide significant background in regard to electronic discovery generally:

> ***Zubulake v. UBS Warburg LLC***, No. 02 Civ 1243 (SDNY May 18, 2003)
> (discussion of the problem of balancing the competing needs of broad discovery and manageable costs; Defendant had declined to search back-up tapes for deleted e-mails because of the cost; accessible and inaccessible data; cost-shifting analysis -- 7 factors).
>
> ***Zubulake v. UBS Warburg LLC***, No. 02 Civ 1243 (SDNY May 18, 2003)
> (in deposition of Defendant's electronics records manager - designated by Defendant as confidential - Plaintiff became concerned that certain of Defendant's records management practices were in violation of the SEA and SEC rules and requested leave to report her concerns on the ground that, as a licensed broker, she has an ethical obligation to report such matters; the court, however, found that Plaintiff had not established a clear duty to report and that an apparent attempt to gain leverage in the law suit was an improper motive and not grounds for removing the confidential designation).
>
> ***Zubulake v. UBS Warburg LLC***, No. 02 Civ 1243 (SDNY July 24, 2003)
> (application of cost-shifting analysis following sample restoration of subgroup of backup tapes).
>
> ***Zubulake v. UBS Warburg LLC***, No. 02 Civ 1243 (SDNY Oct. 22, 2003)
> (consideration of sanctions for failure to preserve electronic records; trigger date for duty to preserve attaches at the time that litigation becomes reasonably anticipated; scope of preservation of relevant documents; whose documents must be retained; what must be retained; elements to establish entitlement to adverse

inference instruction -- obligation to preserve, culpable state of mind, relevance of destroyed documents).